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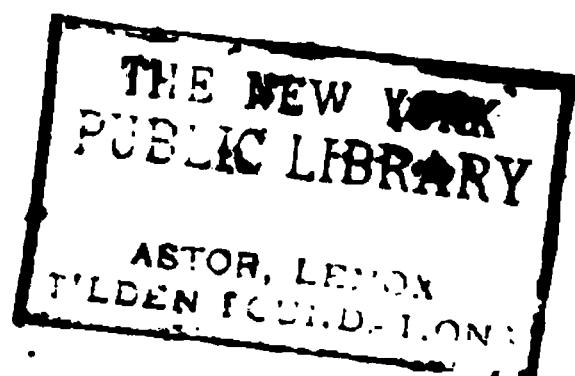


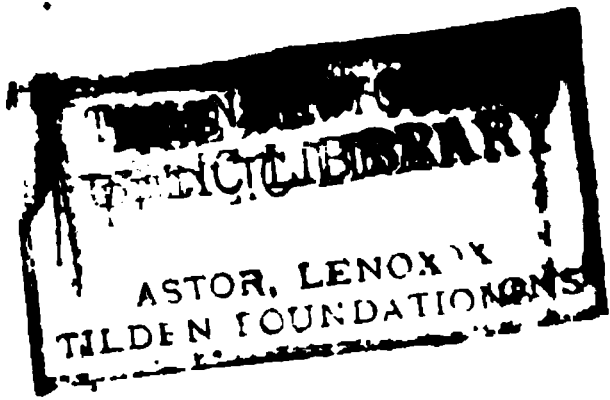












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# Addresses, Discussions, Etc.

By



**ROME G. BROWN**

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Published Discussions Pertaining to  
**CONSTITUTIONAL GOVERNMENT**  
and Kindred and Other Subjects,  
In 2 Volumes:

## **Volume I:**

Judicial Recall; Menace of Socialism; Minimum Wage; Price Maintenance; Uniform State Laws; 3 Years Course for A. B.; The Menace of Roosevelt.

## **Volume II:**

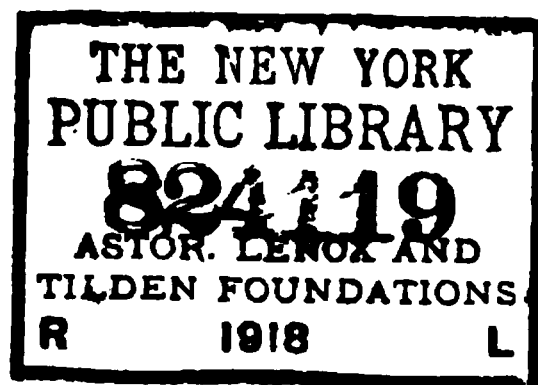
Water Rights and Water Powers,—Particularly State and Federal Control of Water Powers.

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Collected and bound,  
Minneapolis, Minnesota,  
December 1, 1917

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## Introduction

Regardless of the question of their worth, the writer has collected original prints of certain of his papers and addresses delivered mostly during the past ten years, for binding in a limited number of sets. The constant demand for copies of some of these productions seems to warrant this presentation, so far as the limited number of copies on hand would admit, for the use of reference libraries.

Most of these papers and addresses were produced in 1911-1917. The reports and addresses upon Judicial Recall and Socialism were a part of the work of the writer in his capacity as Chairman of the American Bar Association Committee to Oppose Judicial Recall, which position he has occupied since the year 1912. The discussions upon the subject of Minimum Wage and Price Maintenance were in connection with his professional work in the State and Federal Courts upon those questions. The discussions upon Uniform State Laws are in the form of reports made as Chairman of the Minnesota State Board of Commissioners on Uniform State Laws. The discussion of the proposition to establish a three years' course for the degree of A. B. at Harvard, was in connection with his position as Chairman of the committee on that question appointed by the Associated Harvard Clubs. Some peculiar phases of the presidential campaign of 1912, provoked the letter to the Wilson College League, concerning the menace of Roosevelt, which letter had a very wide circulation in the public press.

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The discussions upon Water Rights and Water Powers were made in connection with his general study of that subject, and in connection with his law practice. These Water Rights and Water Power discussions include general discussions before scientific associations, and various presentations (beginning with the year 1911) of the question of State and Federal Control of Water Powers before Committees of State Legislatures and before Federal Commissioners and Committees of the Congress.

All these papers are combined in two volumes, Volume I comprising all the above-named discussions except those concerning Water Rights and Water Powers, the latter comprising Volume II.

For convenience there has been inserted in each volume a Synopsis of Contents, with references to the various papers by the numbers with which those papers are respectively marked. As to some of the papers there is lack of supply sufficient to include all in each set; but such omissions, if made in any volume, are indicated.

Certain cartoons and personal likenesses and biographies have been included, which fact is repugnant to the sense of delicacy of the writer, as it may be to others. However, they are part of the history of the work represented, in connection with which they were published solely on the initiative of others than the writer.

ROME G. BROWN.

Minneapolis, Minnesota,  
December 1, 1917.

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## **VOLUME I**

### **CONSTITUTIONAL GOVERNMENT, ETC.**

*Including:*

**JUDICIAL RECALL**

**MENACE OF SOCIALISM**

**MINIMUM WAGE**

**PRICE MAINTENANCE**

**UNIFORM STATE LAWS**

**3 YEARS COURSE FOR A. B.**

**THE MENACE OF ROOSEVELT**



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ILLUSTRATIONS,  
CARTOONS,  
BIOGRAPHIES, etc.

(Pamphlets 1 to 5).



# *Rome G. Brown*

*Chairman American Bar Association Com-  
mittee to Oppose Judicial Recall*

*BY HUGH H. BROWN*

*Of Tonopah, Nevada, Bar*

REPRINTED FROM  
AUGUST, NINETEEN SIXTEEN  
CASE AND COMMENT, THE LAWYERS MAGAZINE  
VOLUME 22, NUMBER 3

# Rome G. Brown

## Chairman American Bar Association Committee to Oppose Judicial Recall

BY HUGH H. BROWN

*Of the Tonopah, Nevada, Bar*

THE public and professional activities of Rome G. Brown, of Minneapolis, have attracted nation-wide notice during the past few years. As chairman of the American Bar Association's committee to oppose the judicial recall, he has, since 1911, planned and conducted an aggressive anti-recall campaign throughout the country. In the prosecution of this work he has delivered a score or more of addresses before state bar associations, law schools, universities, and business men's clubs, and other organizations, and has debated the question on several public occasions with advocates of the judicial recall. In this work he has traveled over 30,000 miles. Under his direction there have been printed some thirty different pamphlets which have been distributed as educational propaganda on the question throughout the United States. The circulation of such pamphlets exceeds a total number of 700,000. He has also conducted campaigns before various legislatures and electorates where the question was acutely at issue. The fact that in the United States the judicial recall is now a waning, and, indeed, a dead,

issue, is largely credited to Mr. Brown's tireless and effective labors.

William H. Taft, delivering his address as president of the American Bar Association, at the annual session in Washington in October, 1914, said: "This association four years ago appointed a special committee to oppose the judicial recall, and that committee has done great work. Its present chairman, Mr. Rome G. Brown, of the Minneapolis Bar, has delivered effective addresses to many state bar associations throughout the country, and has encouraged legislative opposition in many states to the embodiment of these heresies in statutes. The report of the committee shows that there has been a distinct falling off in the support

of these fundamentally unwise and dangerous proposals."

Referring to Mr. Brown's latest summary of the status of judicial recall, the "New York Nation" in its issue of July 6th, last, says: "Not only is the recall of judges dead as a doornail; in the latest report of the American Bar Association's committee on the subject, it is asserted that movements for getting rid



of the recall in the six states which adopted it are gaining force."

"Leslies' Weekly" in its issue of July 20th, last, says: "The change has been effected largely by the organized teaching of the necessity of constitutional limitations, and of their enforcement by the exercise of the judicial function, to which the judicial recall, in both its forms, is repugnant. This has been one of the labors of the American Bar Association, through its committee to oppose judicial recall, composed of a member from each state, under the energetic chairmanship of Rome G. Brown, of Minneapolis. The annual report of this committee, just published, shows the result of persistent and effective work in combating the advocacy of this socialistic doctrine. The change has come through an enlightenment of the people as to the subversive nature of the proposition that either the tenure of judges or their decisions should be subject to the temporary or local whim of majorities."

"The subsidence in this country of this fallacy to its original socialistic source is due to the application of the only cure for distorted views of government. It is due to that remedial specific for socialism itself,—education."

In legal circles Mr. Brown is known as a leading national authority on the law of water rights, and particularly on Federal water-power legislation. Many of his discussions of water-rights and water-power law have been published; and he is lecturer on the subject of water rights in the law schools of the University of Minnesota and of the University of North Dakota.

He has also become a prominent authority on the subject of the statutory minimum wage, of which he is a pronounced opponent, both upon economic and constitutional grounds. In the Oregon minimum wage cases (*Stettler v. O'Hara* and *Simpson v. O'Hara*), he appeared December, 1914, before the United States Supreme Court in opposition to the constitutionality of these statutes. In this argument he was opposed by Louis D. (now Justice) Brandeis. No decision has yet been filed, and the Oregon cases have been set for re-

argument next fall. Mr. Brown is the author of a published discussion entitled "The Minimum Wage." Discussions by him of the same subject have been printed at various times, including one in the September, 1915, number of "Case and Comment."

To Mr. Brown is also credited the successful outcome in his recent contest for the constitutional right of a private trader to refuse to sell any customer for any reason whatever,—despite the former Federal decisions prohibiting price maintenance as repugnant to the anti-trust acts. This establishment of the right to refuse to sell was an epoch-making event in the law of trade relations in this country. *Great Atlantic & P. Tea Co. v. Cream of Wheat Co.*, decision by Judge Lacombe, of the United States Circuit Court of Appeals, Second Circuit, filed November 10, 1915, 141 C. C. A. 594, 227 Fed. 46, affirming decision by Judge Hough of the United States District Court, Southern District of New York, 224 Fed. 566.

He is in general practice and represents a large and important clientele.

He was born in Montpelier, Vermont, June 15, 1862; graduated from Harvard in 1884 with *magna cum laude*; was admitted to the bar in Vermont in 1887, and removed to Minneapolis the same year. He is vice president and general counsel of the Minneapolis Tribune Company; general counsel of the Cream of Wheat Company, the Minneapolis Water Power Companies, and other corporations. He is chairman of the Minnesota State Board of Commissioners on Uniform State Laws, and was vice president of the National Conference of Commissioners on Uniform State Laws in the year 1913. He was a member of the executive committee of the American Bar Association from 1906 to 1909, and president of the Minnesota State Bar Association in 1906 and 1907. He is active in the alumni activities of Harvard, having been president of the Minnesota Harvard Club in 1907, and president of the Associated Harvard Clubs of the United States in 1906. He is senior member of the firm of Brown & Guesmer, Minneapolis.

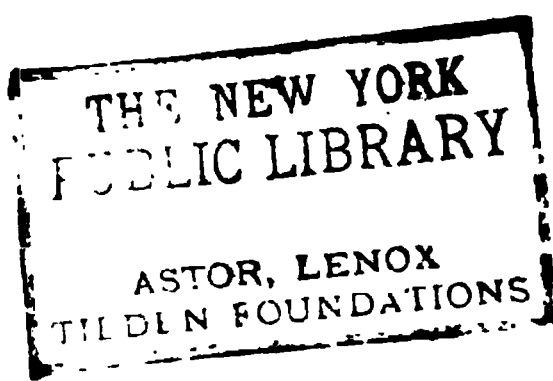


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**JUDICIAL RECALL,**

**Including**

**MENACE OF SOCIALISM**

**(Pamphlets <sup>7</sup>~~6~~ to 34)**



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# REPORT

OF THE

## COMMITTEE TO OPPOSE THE JUDICIAL RECALL.

*(To be presented at the meeting of the American Bar Association, at  
Montreal, Canada, September 1-3, 1913.)*

*To the American Bar Association:*

The undersigned committee, appointed for the year 1912-1913 under resolution of this Association adopted at its annual meeting in 1911, respectfully submit the following report:

The present committee has continued to its utmost ability the work imposed upon the first committee which was appointed for the year 1911-1912, as directed by the resolution of 1911 to "take such steps as it may deem best to expose the fallacy of the Judicial Recall." The scope of its work has been to oppose both the Recall of Judges and the Recall of Judicial Decisions, and the title of the committee has been made to conform therewith. It now stands as the "Committee to oppose the Judicial Recall."

On account of the spreading of the agitation for the Judicial Recall, and by reason of the fact that the legislatures of about 40 states have held their annual sessions during the past year, the work of your present committee has been exceptionally active and extensive.

We have had two general objects in view: First, to carry on as widely as possible, consistently with the limited means at our disposal, a campaign of education throughout the United States in opposition to the Judicial Recall; and, second, to direct or assist, by special work through this committee, the various local campaigns, in different states and their legislatures, in opposition to these measures.

We have at all times kept in close touch with this question as presented in various states and localities, as well as throughout the country at large. Through correspondence between the Chairman and various members of the committee, and between them and opponents of the Judicial Recall in various localities,



we have promoted, wherever necessary, special campaigns. We have encouraged and procured the writing and publication of various discussions in leading magazines and periodicals and newspapers, and have participated in public discussions on numerous occasions at various points in the United States. Where a direct contest was on in a state or in a legislature, we have promoted and organized opposition which, in most instances, has been successful.

In connection with our work we have distributed various printed discussions throughout the United States which have been sent to the leading newspapers, lawyers, citizens, libraries, officers, state and federal, all federal and state judges, and members of legislatures. Altogether, we have circulated something over 350,000 pamphlets. These have included Hon. Wm. B. Hornblower's address on "The Independence of the Judiciary—The Safeguard of Free Institutions"; Senator George Sutherland's address, "The Courts and the Constitution"; President Butler's address on "Why should we change our Form of Government"; also President Butler's address on "What is Progress in Politics"; Dean Thayer's article on "Recall of Judicial Decisions"; Rome G. Brown's address on "The Judicial Recall—A Fallacy Repugnant to Constitutional Government"; also Mr. Brown's address on "The Judiciary as the Servant of the People."

We have also promoted discussions at meetings of many local Bar associations, state, county and city, and provided speakers before students of universities and particularly of law schools. Besides covering all the libraries in the United States, we have, as part of our propaganda, supplied anti-Judicial Recall literature to every student in every law school in the United States. In most of the school and university debates upon this subject, of which there have been many hundred during the past year, the results of the distribution of our literature and the assistance which we have given have been shown from the fact that generally the contestants against the Judicial Recall have been winners of such debates.

The distribution of printed discussions has been facilitated by the fact that many senators in the Congress are active oppo-

nents of these measures, and such senators have made, through our committee, distribution of anti-Judicial Recall pamphlets, printed in the form of senate documents, besides the other general circulation made under the direct supervision of the senators themselves. We wish to acknowledge our obligation to Clarence W. DeKnight, Attorney-at-Law, Washington, D. C., whose interest and assistance have greatly facilitated the work of this committee in distributing these pamphlets to various parts of the United States.

The significance and danger of the Judicial Recall are, in many states and localities, underestimated, even by some members of our committee. Because, here and there, up to the present time, no special local demand for the Judicial Recall has shown itself, it seems to be considered that the adoption in 1908 in Oregon of the Recall of Judges, even though later followed in 1911 in California, was not necessarily indicative of the danger of its further extension. It has been advised by one or two members of the committee that the distribution of literature in localities where there is, as yet, no open agitation for the Recall, might precipitate activity in its favor. The results have proven that such an attitude is not justified. The Judicial Recall measures are, in the first instance, enticing to those who do not really understand their significance. The result is, that in many localities a strong following in their favor has been slowly worked up, and that, where few would have thought them possible of adoption, they have been forced to a vote after a quick and spirited campaign and have either been adopted or have come very nearly to adoption. The result shows that the campaign of general education upon the subject, which we have undertaken, is the wisest course. This is on the same principle that a preventive, when an epidemic threatens, is more wise than to wait until some drastic action is required to counteract or to cure the effects of an existing malady. Our campaign has been on the lines of a course of hygiene, to educate citizens in advance to a healthful, wholesome, intelligent attitude upon the constitutional questions and upon the questions of policy involved in the proposition of the Judicial Recall.

Besides its adoption in Oregon and California by constitutional amendment, the Recall of Judges has been, within the past

year, made a constitutional provision in the states of Arizona and Nevada. It has been recently voted by the legislatures of the states of Kansas and Minnesota, to be submitted as a constitutional amendment for adoption by the people. At the last election in Colorado, constitutional amendments for both the Recall of Judges and for the Recall of Judicial Decisions, initiated by the people under the Initiative and Referendum, were adopted.

In Arkansas, a constitutional amendment for the recall of judges, initiated by the people, was passed at the 1912 election; but the state Supreme Court held that it had not been properly submitted and, therefore, not adopted. In Kansas and Minnesota the amendment proposed by the legislature excludes from the Recall election the selection of a candidate to fill the vacancy if the Recall is successful. This eliminates only one of the many objections, but through this manner of sugar-coating the measure which is proposed as a remedy, many legislators in the above states have been deceived into withdrawing their opposition to the Judicial Recall. In Colorado a case is pending in the Supreme Court questioning the regularity of the submission to the people of both amendments; but until that case is decided, both the Recall of Judges and of Judicial Decisions are in force in that state.

In many of the 40 or more state legislatures which have just adjourned, measures for constitutional amendments providing for the Judicial Recall were presented, and in some of them, while not successful, received surprisingly strong support. In North Dakota, after most strenuous contest, the Recall of Judges lost by one vote.

Minnesota is, thus, the first state having any of its territory east of the Mississippi River to adopt any form of the Judicial Recall, even by the vote of its legislature. The movement for its adoption seems to be one originating upon the Pacific Coast and to be spreading east. By continued work we may hope to prevent its adoption by the people even in Kansas or Minnesota. However, it is demonstrated that it is not safe to depend upon defeating it at the polls. The fight in each case must be made in the state legislature where it is more practicable to demonstrate

its fallacy by the education of a representative few than to depend upon a campaign before the entire body of the voters.

It is a mistake, however, to assume that the agitation has not become a serious one east of the Mississippi. It has already shown up strong, although without, as yet, sufficient strength for adoption, in the legislatures of Wisconsin, Illinois, Ohio and other states. In the recent Massachusetts legislature, a measure was presented and strongly urged for a constitutional amendment authorizing the Recall of Judicial Decisions "in all cases when a law otherwise duly enacted by the legislative authority of the commonwealth shall be held by the Supreme Judicial Court to be in violation of the constitution." In April last, there was introduced in the Congress a joint resolution proposing to the states the election of all federal judges by vote of the people, with a tenure of 12 years, and providing for the recall of all judges, both of the supreme court and inferior courts, at any general election at which presidential electors shall be chosen. A senate joint resolution was introduced in December, 1912, in the Congress, proposing a constitutional amendment providing that any decision of the Federal Supreme Court declaring unconstitutional an act of the Congress, may be submitted by the Congress to the electors, and that by vote of a majority of congressional districts and of the states, such act should, notwithstanding the decision of the Supreme Court, become a law. These measures have not met any considerable support, but it is significant that such measures as these should be even proposed and that they would find active supporters.

We do not at this time deem it necessary, as part of our report, to emphasize the vice of the Judicial Recall. This subject is now perhaps more generally discussed throughout the country than any other. While, whether considered by number or character, the weight of the discussion is overwhelmingly in opposition, there is, however, a thoroughly organized and persistent advocacy of the Judicial Recall.

We have appended as a part of this report a synopsis of the legislation or constitutional amendments adopted in the states above

referred to. We have also appended the report of the New York State Bar Association in special meeting to this Association upon the effort in the state to publish in each county the attitude of the local Bar upon the question of judicial recall. Following this is added a selected bibliography showing much of the current discussion.

We would respectfully recommend that the work of this Association in opposition to the Judicial Recall be continued, upon the same lines as heretofore; and that the utmost encouragement and most liberal appropriations possible be given by this Association to its committees which shall be organized each succeeding year to expose the fallacy of the Judicial Recall.

Respectfully submitted,  
 ROME G. BROWN, Minneapolis, Minn., *Chairman*,  
 LAWRENCE COOPER, Huntsville, Ala.,  
 EVERETT E. ELLINWOOD, Bisbee, Ariz.,  
 GEO. B. ROSE, Little Rock, Ark.,  
 CURTIS H. LINDLEY, San Francisco, Calif.,  
 FRANK E. GOVE, Denver, Col.,  
 WILLIAM BROSMITH, Hartford, Conn.,  
 WILLARD SAULSBURY, Wilmington, Del.,  
 CHAPIN BROWN, Washington, D. C.,  
 ALEXANDER R. LAWTON, Savannah, Ga.,  
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 HUGH H. BROWN, Tonopah, Nev.,  
 FRANK S. STREETER, Concord, N. H.,  
 RICHARD V. LINDABURY, Newark, N. J.,  
 WILLIAM C. REID, Roswell, N. M.,  
 WILLIAM B. HORNBLOWER, New York, N. Y.,  
 HARRY SKINNER, Greenville, N. C.,  
 H. A. BRONSON, Grand Forks, N. D.,  
 LAWRENCE MAXWELL, Cincinnati, Ohio,  
 J. R. KEATON, Oklahoma City, Okla.,  
 FREDERICK V. HOLMAN, Portland, Ore.,  
 RODNEY A. MERCUR, Towanda, Pa.,  
 MANUEL RODRIGUEZ-SERRA, San Juan, P. R.,  
 THOMAS A. JENCKES, Providence, R. I.,  
 P. ALSTIN WILLCOX, Florence, S. C.,  
 NORMAN T. A. MASON, Deadwood, S. D.,  
 ALBERT W. BIGGS, Memphis, Tenn.,  
 WM. H. BURGESS, El Paso, Tex.,  
 E. B. CRITCHLOW, Salt Lake City, Utah,  
 GEORGE B. YOUNG, Newport, Vt.,  
 EPPA HUNTON, JR., Richmond, Va.,  
 CHARLES E. SHEPARD, Seattle, Wash.,  
 D. J. F. STROTHER, Welch, W. Va.,  
 BURR W. JONES, Madison, Wis.,  
 JOHN W. LACEY, Cheyenne, Wyo.,

*Committee to Oppose the Judicial Recall.*

## PROVISIONS FOR JUDICIAL RECALL ADOPTED IN VARIOUS STATES.

The following synopsis shows the Judicial Recall measures already adopted in certain states. In states not here mentioned it has not been passed by the legislature nor adopted by the people.

OREGON.—Recall of Judges. Constitutional amendment, adopted in 1908 under initiative by the people. Authorizes recall

and new election to fill vacancy at the same time on petition not to exceed 25 per cent of qualified voters. Allows judge to resign within five days. In case of failure to resign, recall election within 20 days after filing petition. Charges of not to exceed 200 words in length must be included in petition and placed on ballot, and defense of same length allowed on ballot. Grounds for recall and nature of statement of same not specified. It is now generally assumed that constitutional provision not self-executing, and requires facilitating legislation. Facilitating act of legislature in 1913 passed but vetoed by Governor. No successful instance of judicial recall in this state. See Oregon Constitution, Article II, Sec. 18.

CALIFORNIA.—Recall of Judges. Constitutional amendment adopted in 1911. Constitutional provision is made self-executing, but allows further legislation. Provision for charges and defense same as in Oregon, except 300-word defense allowed. Recall election includes selection of successor. Majority of votes actually cast decides, as in Oregon. Recall petition must be signed by 12 per cent of number of votes cast at last election; provided that in the case of any state officer elected in any political subdivision of the state, the percentage is 20 per cent, and in case of officer elected from the state at large, signatures must include 1 per cent of the number of votes cast at the last election in each of five counties. The only successful judicial recalls which have taken place in the United States, so far as we have learned, is that of the recent case of Judge Weller, in San Francisco, and one justice of the peace in Arizona. See California Constitution, Article 23.

COLORADO.—Recall of Judges and Recall of Judicial Decisions. Constitutional amendments on initiative of people adopted general election 1912. Recall of Judges same as in California, except 25 per cent of number of votes cast at election required on recall petition. Recall of Judicial Decisions provides that before a supreme court decision declaring a statute or certain city charter provisions unconstitutional shall be enforced, it may be, on

petition of 5 per cent of qualified electors of the state or city, as the case may be, referred to the electors of the state or city; and if a majority of the votes cast is against the decision, the decision is recalled and the law stands. Thus there is established, in Colorado, a sort of local option as to the control of the final judgments of the highest court of the state. See Colorado Constitution, New Article XXI, and amendment to Section 1, Article VI. A case questioning the regularity of the submission of these amendments, and therefore, their validity, is now pending in the State Supreme Court.

ARIZONA.—Recall of Judges. Arizona Constitutional Convention, December 9, 1910, proposed a constitution which included provision for recall of all public officers, including the judiciary. Allowed recall from any office by qualified electors of any electoral district, which electoral district may comprise the entire state. Recall petition must be signed by 25 per cent of the number of votes cast at last preceding general election for the office in question. (Section 1, Article VIII, Constitution of 1910.) August 15, 1911, this constitution disapproved by President Taft. (See Veto Message, House Document 106, 62d Congress, 1st session.) By joint resolution of August 21, 1911, the Congress provided as a condition for admission that said Section 1 of Article VIII of the proposed constitution should be amended by vote of the people by inserting the words "except members of the judiciary." (See Joint Resolution No. 8, of August 21, 1911.) By special election December 12, 1912, the amendment eliminating the recall of the judiciary was passed by vote of 14,963 in favor, and 1980 votes against. After admission to statehood, the first legislature of Arizona, on April 26, 1912, proposed a constitutional amendment changing Section 1 of Article VIII by eliminating the exception proposed by Congress and adopted by the people as a condition to being admitted to statehood. On November 5, 1912, at a special election, this amendment was adopted by 16,272 votes in favor and 3705 votes against. (See Arizona Constitution, Section 1, Article VIII, as thus amended.) There has, as yet, been no attempt at recall in Arizona, except one justice of the peace was recalled in a small precinct in Cochise County by less than a dozen votes; and there



is now pending a recall against Judge John C. Phillips of Maricopa County, for directing a verdict in a personal injury case, under a petition circulated by the labor unions of Phoenix and filed while Judge Phillips had yet under advisement a motion for a new trial.

NEVADA.—Recall of Judges. Constitutional amendment proposed by legislature in 1911; adopted general election 1912. General provisions same as in Oregon.. Facilitating legislation adopted in 1913. See Nevada Session Laws, Ch. 258, Laws 1913 and Constitution, Article II, Section 9.

ARKANSAS.—Recall of Judges. Constitutional amendment, initiated by people under the initiative and referendum, passed at the 1912 election. Supreme Court held not properly submitted and, therefore, never adopted. Under state constitution only three amendments can be submitted at one election. The 1913 legislature submitted three amendments on other subjects. Accordingly, no recall amendment can be passed for at least two years.

KANSAS.—Recall of Judges. The legislature of 1913 proposed amendment for adoption by the people at general election in 1914. It provides for recall election without selection of candidate to fill vacancy. Recall petition must be signed by 10 per cent of number of vote cast at last election in case of state officers, 15 per cent in case the electoral division is less than a state and greater than a county, and 25 per cent where it is a county or lesser division. See Kansas Laws 1913, Ch. 336.

MINNESOTA.—Recall of Judges. Constitutional amendment proposed by legislature of 1913 for submission at general election of 1914. Gives power to the legislature to provide recall of elective officers, including judges. Recall petition must be signed by not less than 20 per cent and not more than 30 per cent of number of votes cast for governor in the electoral division at last preceding election. Judge may resign in five days after filing petition; otherwise, election in 25 days. Question is confined to recall. No election of successor. 200-word charge and 200-word defense. No petition to be filed until judge has held office for six months nor within 60 days of any decision complained of. Recalled judge not eligible for re-election. See Minnesota Laws 1913, Ch. 593.

REPORT OF THE NEW YORK STATE BAR ASSOCIATION TO THE AMERICAN BAR ASSOCIATION UPON THE EFFORT IN NEW YORK STATE TO PUBLISH IN EACH COUNTY THE ATTITUDE OF THE LOCAL BAR UPON THE QUESTION OF JUDICIAL RECALL.

The New York State Bar Association reports that, pursuant to a request of the American Bar Association and immediately upon its receipt, a special meeting of the State Bar Association was called for April 13, 1912, at Albany, at which resolutions were unanimously adopted condemning the doctrine of judicial recall.

To secure action by the Bar of each county in the manner contemplated the following committee was appointed:

Alton B. Parker, *Chairman*,

William B. Hornblower,  
D. Cady Herrick,  
Austen G. Fox,  
Adelbert Moot,  
A. T. Clearwater,  
Lewis E. Carr,  
Ansley Wilcox,

William D. Guthrie,  
Walter Shaw Brewster,  
Morgan J. O'Brien,  
Ceylon H. Lewis,  
Richard E. White,  
Theodore R. Tuthill,  
Henry Purcell.

The committee thus appointed began its work at once by sending to Presidents of County Bar Associations, to county judges and to other prominent lawyers, a letter, of which a copy is annexed to this report, reciting the action taken by the American Bar Association and the New York State Bar Association, and urging that the work be taken up in each county.

This letter was followed by others, more special in character, and all seeking to encourage the Bar in each county of the state to carry out the campaign inaugurated by the American Bar Association.

Though the call came to the State Bar Association so late that our work had to be done in the midst of a political campaign which excited partisan opposition to our cause the State Association and its committee feel that an incalculable amount of good

was accomplished in the direction desired, and that the result of the work done in New York justified the hope of the American Bar Association.

The committee of fifteen made full report at the last meeting of the State Bar Association, attaching to the report copies of the resolutions passed in each county and copies of the local papers of each county containing full report of the meeting, and the action taken. Special care had been taken to impress the necessity for thorough publication to the people. How well this necessity was appreciated and met was evidenced by the mass of newspaper clippings attached to the committee's report. These clippings would alone have made a large volume.

The interest with which the work was taken up in the various counties was well indicated by the fact that in almost every case the resolutions were an original draft. And these resolutions were especially well done. Greene County was among those counties which did this work in a masterly fashion, and this single set of resolutions I have attached to this report, by way of evidence of the effectiveness of the local Bar Association as a guide post to public opinion. The reading of those Greene County resolutions must inevitably leave a deep impression.

The Bar in thirty-two counties of the state were persuaded to take up the work effectively, with the result that having recorded in appropriate resolutions their judgment on the questions at issue, the publication was procured in all the local papers of the resolutions so adopted, of a list of the lawyers present at the meeting and of the text of the speeches made in support of the principles expressed in the resolutions.

Therefore, in each of those thirty-two counties in New York State the testimony has been given to every voter and thinker that the lawyers of his own county, most of whom he knows by reputation, some of whom he knows personally and not a few of whom he has full confidence in, are, regardless of party, unalterably opposed to this attempt to cripple our judicial system.

As we understand it, that is the result desired, and we are not a little proud that we can report so much accomplished.

Our pride does not, however, result in any abatement of effort.

The work is still being carried on and will not stop until in every remaining county of the state this plan of special education has been carried out.

Respectfully submitted,

ALTON B. PARKER, *President*.

FREDERICK E. WADHAMS, *Secretary*.

*Dear Sir:*

The American Bar Association is engaged in a movement nation wide having for its purpose the conduct of a campaign of education to be carried on by the Bar of each and every county of the several states, the belief entertained being that the expression of the judgment of the local Bar, without regard to partisan affiliations, upon the subject of judicial recall, with the reasons upon which said judgment is founded, followed by the publication of a report of their action in all the local papers, would be more effective than any other campaign of education that can be devised. The reasons for this view need not be stated, for they are obvious.

In pursuance of that plan, and the request of the American Bar Association addressed to the State Bar Association of this state, a special meeting of the State Bar Association was held at Albany on the 13th of April, the outcome of which was the adoption, by a rising vote, and without dissent, of the following resolutions:

*Resolved*, That it is essential to the welfare of the community, the perpetuation of our free institutions and the protection of the personal liberty and property rights of the individual, that the independence of the judiciary should be preserved as established by the wisdom of the founders of our institutions, state and national.

*Resolved*, That the recall of judges or the reversal of judicial decisions by popular vote would destroy the independence of the judiciary and the impartial administration of justice and deprive all classes of the community of the protection now afforded to individual rights by substituting for the training, intelligence and conscience of the judiciary, and settled rules of law, public clamor, agitation and the constantly varying opinions of voters overruling the judgments of the courts and punishing judges for unpopular decisions.

*Resolved*, That the New York State Bar Association declare its profound conviction that any such revolutionary proposals would be fraught with immeasurable danger to our constitutional institutions and to the fundamental rights of the individual, rich or poor, and it urges the Bar of the state and of the nation to unite, irrespective of party, in opposition to such proposals and in defense of an independent judiciary.

*Resolved, further*, That a committee of fifteen be appointed by the President of the Association to cooperate with the American Bar Association and the Bar of each of the several counties of this state in order that the principles involved in the movement for the recall of judges and judicial decisions may be thoroughly explained to the people.

On motion of Judge Herrick :

WHEREAS, There exists a widespread feeling of discontent with our judicial system and the manner in which justice is administered which has resulted in undue criticism of the judiciary and of the Bar and in the proposal of unwise measures to remedy the evils which are believed to exist;

*Resolved*, That it is desirable to investigate the causes which have produced this public sentiment and what measures can be adopted to remedy any evils that are found to exist and allay the discontent of the people, and for that purpose that the committee of fifteen, provided for in the resolutions offered by Mr. Hornblower, and now adopted, be requested to investigate the causes leading to the present feeling of discontent with our judicial system and with the manner in which justice is administered, and if any evils be found to exist, that recommendations be made for their abatement and for the correction of any weaknesses found to exist in our judicial system, in lieu of the recall of judges and of their decisions, and that such committee report thereon to the Association.

The committee, who are attempting to carry out the instructions of the State Bar Association, are especially desirous that meetings be held in the several counties as promptly as due notice to the various members of the Bar in each county will permit. May we ask you to take the matter up with your brethren as speedily as possible; and after your meeting has been held, send to us your report and four or five copies of a local paper containing an ac-

count of your proceedings, to the end that we may embody them in a report which the State Bar Association is to make to the American Bar Association.

Very sincerely yours,

ALTON B. PARKER,  
*Chairman, Committee of Fifteen.*

At a special meeting of the Greene County Bar Association held May 18, 1912, the following resolution was passed unanimously:

WHEREAS, The federal and state constitutions were adopted by the people, and each can be changed by the people in the way therein severally prescribed whenever upon deliberate judgment a change is deemed desirable by reason of new conditions or for other reasons;

*Therefore be it resolved*, By the Greene County Bar Association, duly assembled, that we are unalterably opposed to a construction of such constitutions by the courts to meet a popular or spasmodic demand, or to fit them to alleged modern situations and to any construction of our constitutions except in accordance with their terms and the intention of the people when the same were severally enacted.

*And be it further resolved*, That we are also unalterably opposed not only to the recall of judges by popular vote, but to subjecting their decisions to a vote of the people for the purpose of determining thereby whether the construction of the constitutions made by the courts in such decisions be upheld.

*And be it further resolved*, That in the opinion of our members the continued independence of our federal and state judiciary is essential to the maintenance of our form of government.

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# REPORT

OF THE

## COMMITTEE TO OPPOSE THE JUDICIAL RECALL.

*(To be presented at the meeting of the American Bar Association, at  
Washington, D. C., October 20-22, 1914.)*

### *To the American Bar Association:*

The undersigned, appointed for the year 1913-1914 as your Committee to Oppose the Judicial Recall, respectfully submit the following report:

### OUTLINE OF THE YEAR'S WORK OF THE COMMITTEE.

The activities of your committee during the year have been, as heretofore, nation-wide. Our object has been to spread a general propaganda of education; to promote study and discussion of the arguments for and against the judicial recall; to bring to the citizenship of the nation the conviction that the judicial recall measures are not remedial, but that they are inconsistent with, and indeed subversive of, our constitutional democracy; to formulate the unanswered and unanswerable arguments against the judicial recall so that they could be readily utilized by opponents of the measures, who might not have had time or opportunity to sift out by original study the salient points which are really decisive of the issues involved; and to encourage a publication as wide as possible of the matters thus presented.

The discussions of this subject had heretofore been too much confined to the forums of the American Bar; they had been expressed too much in the parlance of lawyers. Any citizen, who is a lawyer or who has a judicial or lawyer-like mind, may be assumed to be able, without help, to reach an intelligent conclusion on this subject. Not so the average voter, who, not trained in the science of constitutional law, is easily led astray by fallacies so susceptible of subtle, insidious and enticing presentation as those of the judicial recall. Intelligent citizens are drawn away from the real essence of the controversy and become infected with a superficial predilection in favor of judicial recall,

through the peculiar methods of its advocacy. This tendency among voters to prejudice in its favor cannot be overcome merely by the assumed authoritative statement of those who are learned in the law. They must be converted by arguments which bring to them conviction as to the real merits of the issue; and arguments must be formulated with that object directly in view.

We have, therefore, encouraged and procured such treatment of the subject throughout the country. Our object has been also furthered by the voluntary co-operation of lawyers and scholars of eminence whose work was not done directly in connection with that of your committee. Many members of the committee have actively engaged in our propaganda in their respective states. The Chairman of the committee has, in compliance with requests, addressed various legal and economic associations in different parts of the country upon various phases of the question. Some of these discussions have been circulated in pamphlet form and widely published in the press. The judicial recall has been made the subject of college and high-school debates extending throughout the year in various parts of the country, and particularly in the Northwest. The chairman of this committee has personally instituted prize contests in the law schools and high schools of Minnesota for the best arguments against the judicial recall. The prize essays will be published in full in the leading papers of Minnesota before the next general election in that state. Through these essays and their publication, and the general school debates with which they have been preceded, a thorough and careful study of the subject has been induced among a large number of citizen-voters throughout the state. With the accompanying waking up of the public press, it is hoped that this campaign of education will bring about a rejection by the people of Minnesota at the next election of the proposed constitutional amendment authorizing the recall of judges.

#### PRESENT STATUS OF JUDICIAL RECALL AGITATION.

Few state legislatures have held sessions during the past year. The status of the judicial recall question, so far as state legislation is concerned, remains as shown in our last report. The con-

stitutional amendments proposed by the 1913 state legislatures of Kansas and Minnesota will be voted upon at the general elections next November. These authorize legislation for the recall of all elective and appointive officers, including judges. These require a separate recall election, apart from the election of the successor of the deposed judge, in case the recall is successful. By eliminating one of the incidental objections to the judicial recall, these measures, thus sugar-coated, were fed to and swallowed by the legislatures of these two states, where, without modification, the recall of judges had been previously rejected. Vigorous campaigns in both states are being made against these measures, where it is urged that the inclusion of the recall of judges is ground for the rejection by the people of the entire amendment.

Similar measures had been urged in the 1913 legislatures of Ohio, Wisconsin and North Dakota. In the two latter states, however, the recall of judicial officers was excepted. In Ohio the same exception was made and other provisions, restrictive of the judiciary, substituted. Colorado still remains the only state with a constitutional amendment providing for the recall of judicial decisions. That fact, with a statement of the nature of such amendment, was noted in our last report. Within the past year the citizenship of Colorado has seemed to come to a better realization of the necessity of consistent and deliberate constitutional interpretation. The rash and retrogressive nature of the action of the people of that state, in rushing to the extreme of the judicial recall measures, is now being recognized in the saner and more sober second thought of its citizens. While we may not look for a repeal of these amendments, at least for some considerable time, it is safe to say that they are regarded more and more with disfavor.

In fact, a perceptible change in sentiment toward the judicial recall is slowly but surely showing itself among the people of the different states. In many localities its true nature is not yet understood. In most states the average voter has, as yet, insufficient appreciation of its baneful character. The work of education must be continued. The signs, however, of increasing en-

lightenment, due to persistent efforts of its opponents, are everywhere apparent. Former leading advocates of judicial recall are saying less about it. Some of them are now saying nothing about it. Some have apparently given up the idea of the recall of judges and have turned to the judicial decision recall as a substitute. Others, more adroit, have apparently given up both the recall of judges and the recall of judicial decisions and have retreated to positions less antagonistic to constitutional democracy. For instance, the controversy over this question in Ohio, which centered in the recent constitutional convention of that state, resulted in the rejection of both the recall of judges and of the recall of judicial decisions and in the adoption of what is sometimes called the "Ohio plan," adopted at the general election in September, 1912. This plan provides that no act of the legislature, duly approved by the executive and not vetoed by the people through the use of the referendum, shall be declared unconstitutional by the state supreme court unless at least six of the seven judges concur. A similar constitutional amendment will be voted upon by the people of Minnesota at the next general election, requiring concurrence of five out of seven judges of the Supreme Court to nullify a statute as unconstitutional. Colorado participates in the same plan and also extends it. In addition to its recall amendments, a state constitutional amendment forbids certain courts from declaring a statute or ordinance unconstitutional on the ground that it contravenes the Federal Constitution. These substitutes, such as the Ohio plan, for the drastic and subversive judicial recall measures have the merit that they are, at least, less repugnant to our system of government than the recall. The jurisdiction and function of a state court, so far as observing the requirements of the Federal Constitution is concerned, are expressly fixed by that instrument, which makes it the sworn duty of every judge, federal or state, to observe the provisions of that fundamental law as the supreme law of the land. This duty and function, so imposed by the supreme law of the land, would not seem to be subject to abolishment, or even diminution, by any legislative enactment or constitutional provision

of a state. Therefore, the Colorado extension of the Ohio plan would manifestly seem to be repugnant to the Federal Constitution. Depriving a mere majority of the State Supreme Court of the power to invalidate a statute is less objectionable.

Indeed, as, through the initiative and referendum, the powers of state legislation become more and more under the direct arbitrary action of the electorate, it is necessary, for the proper protection of personal liberty and property rights, that the safeguards of the Federal Constitution should, more than ever, come within the direct jurisdiction of the Federal Supreme Court. Under the present Federal Judiciary Act that federal jurisdiction, as applied to the review of judgments of state courts upon the constitutionality of state statutes, is limited to a review of the judgments of state courts wherein statutes are held valid. The American Bar has long advocated the extension of that federal jurisdiction also to decisions of state courts wherein a state statute is held invalid upon federal grounds; but it seems difficult, and perhaps impossible, to get such extension through the Federal Congress. At the present time a majority of a state supreme court may, generally, declare a state statute invalid. The more difficult it is made for a state supreme court to invalidate a state statute, the more is the opportunity increased to have the constitutionality of a state statute adjudicated by the Federal Supreme Court. Where now usually a majority of a State Supreme court may invalidate a state statute upon federal grounds, the final judgment of the highest court of that state as to the constitutionality of such statute must, under the Ohio plan, be in favor of its validity unless more than a majority of the state court are against it. This would increase the number of cases where a writ of error would lie to the state court upon an adjudication of a constitutional question. We are not advocating the Ohio plan, but simply suggesting that, for existing insufficiencies which are recognized by the Bar generally, it offers some elements of remedy, consistent with our form of government. In that respect it differs from the judicial recall, which is lacking in remedial character and is subversive of our form of government.

### THE DILEMMA OF THE JUDICIAL RECALL ADVOCATE.

The judicial-recall controversy has developed another interesting and encouraging phase. Its advocates formerly made great headway by first detailing evils in the administration of justice, many of which are well recognized, and then jumping to the assumed, but unanalyzed, conclusion that the recall of judges or of judicial decisions by popular vote would involve reform measures which were constructive and remedial in their nature and which were consistent with our system of government. However, by persistent and widespread opposition, the superficial and fallacious character of the reasoning of the advocates of these measures has been discovered to their formerly receptive audiences. Such advocates are forced now squarely to face the real issue presented by the proposal of the judicial recall. They have become compelled to recognize that issue as one between the continuance of our constitutional, democratic government and a fundamental change in our form of government. They have been driven, therefore, to base the advocacy of the judicial recall upon the necessity, or rather upon the alleged necessity, of overturning the established principles of our constitutional government and establishing a different government or an entirely new and different constitutional basis fundamentally at variance and indeed in conflict with that system established and heretofore maintained. Placed in that dilemma, many of the former advocates of the judicial recall have shrunk before the alternative thus forced upon them and have given up the subversive proposition of the judicial recall and have become identified with measures less revolutionary. Some of them, instead of undermining the judiciary as by the judicial recall, would restrict the exercise of the judicial function, as by the requirement of more than a majority decision of a court to declare a statute unconstitutional. Some of them have become converts to the worthy cause of reform in judicial procedure, as a constitutional and adequate remedy for manifest insufficiencies.

One of the salutary effects of this agitation has been to strengthen the cause for which the American Bar has been for years working—the cause of remedial reforms in the administra-

tion of justice. That cause has advanced in the past few years with rapid strides, as shown by the adoption of various statutes and rules of procedure eliminative of former obstacles to the efficient enforcement of the law. Organized efforts for further reforms, which promise effective results, are shown by the investigations and the reports which are now in progress on the part of the National and State Bar Associations and on the part of associations not controlled by lawyers. The National Economic League, through its committee of two hundred selected from all parts of the country and composed of the most distinguished lawyers and laymen, has, through its preliminary report just published, outlined a systematic movement for thorough reforms corrective of present evils and promotive of the best efficiency in the administration of justice.

The socialist agitator of the judicial recall gladly accepts the other horn of the dilemma and, with unparalleled affrontery, pretends to urge upon thinking American citizens the theory that our Federal Constitution was born of a conspiracy among "exploiters" of the oppressed—a conspiracy which culminated in an act of criminal bad-faith when the people of the nation were betrayed by those "exploiters" to whom they had entrusted the duty of framing a constitution for the purpose of creating better business and commercial relations between the states and to supply the need of a stronger union. He further urges the theory that the same traitors to the cause of the people, having thus deliberately foisted upon the states a fundamental law which was intended by them to be an instrument of oppression, instead of one of protection of the rights of liberty and property, they, the "exploiting" class, through that fundamental instrument of oppression, procured an administration of our government, which can only work out injustice to its subjects. That government is administered, it is said, by an oligarchical and despotic judiciary "whose sympathies are with the propertied class and vested rights" and by whom "the progressive and humanitarian measures necessary to the betterment of their (the people's) condition are almost invariably negatived." The Federal Supreme Court, by its decisions, it is alleged, deliberately perverts the law, and



the reasonings of its decisions are merely instances of "sardonic irony" and of "adding insult to injury." Thus the socialist denounces our constitution and our entire system of government as unworthy of the respect or regard of the citizen. It is an evil in itself and is therefore the source of all existing evils. It stands in the way of the elimination of private property rights. It must, therefore, be overthrown. Until such complete change can come, and as an indirect instrument for achieving such change, he urges judicial recall, for the very reason that it is destructive of judicial functions; and he recognizes the fact that it is the independent exercise of the judicial functions which alone insures the enforcement of constitutional safeguards to personal and property rights.

Some who would disavow socialism as such, are, nevertheless, the allies of this socialist doctrine. Within the past year a chief justice of the supreme court of one of the oldest states, in an address avowedly intended for the people of the entire nation, held up to derision our Federal Constitution, its makers and its expounders, as a basis for his advocacy of the decision recall and of other changes in our form of government. His attack upon the Federal Constitution and upon our system of government has never been surpassed in malignant vituperation by that of any socialist doctrinaire. The Chairman of this committee recently had the pleasure, in the presence of that chief justice and before the Bar Association of his state, of denouncing such views of our institutions and the utterance of such views from such a source.

#### THE FALLACY OF JUDICIAL USURPATION.

The most common fallacy leading to the greater fallacy of the judicial recall, is that arising from the too prevalent misrepresentation and the resulting misunderstanding with reference to the nature of the judicial function under our system of government. This fallacy is embodied in the socialist doctrine that the judiciary has "usurped" the function to pass final judgment upon the question as to whether a statute is repugnant to the Federal Constitution. This fallacy is the product of socialism, with which certain present-day agitators have become

infected to the extent that they, too, proclaim that this function of the courts has been "grasped" by the courts themselves. Some refer to it as a "veto" by the judicial department upon the acts of the legislature. Others refer to it as an arrogated power of "judicial nullification," unwarranted under a proper view of judicial functions. They would deprive the courts of that function which is essentially the function of the courts—the function of weighing the facts and the law as applied in a particular case to a particular statute and afterwards of expressing in a final decree their deliberate and well considered judgment upon the question of constitutionality. They would substitute, in the place of the careful *judgment* of a tribunal of triers experienced in the trial of facts and learned in the law, the arbitrary and capricious *pre-judgment* of comparatively incapable arbiters declared at a mass-meeting or at a referendum election.

As this claim of usurpation is the foundation of the hue and cry made by the socialists and their allies, and is such a common basis for the judicial recall arguments, we wish here to note briefly some reasons why it is unfounded. The same chief justice, heretofore referred to, has publicly stated with reference to this judicial function:

"The possibilities of the court were not understood, and indeed were unknown until the vast extension of power was grasped, without any grant in the constitution itself, by an *obiter dictum* opinion in *Marbury vs. Madison*. . . . The importance, indeed the overwhelming preponderance of the judiciary in the government was unexpectedly created in 1803 by a decision of the Supreme Court of the United States, without a line in the constitution to authorize it, when that body assumed the right to nullify and veto any act of Congress that they chose to hold unconstitutional. This astonishing declaration was made in the case known as *Marbury vs. Madison*, by Chief Justice Marshall. The doctrine was shrewdly set forth in an *obiter dictum*, promptly seized upon as a boon by the special interests and by all who at heart believed in the government of the many for the benefit of the few."

Let us pass the imputations as to the motives of Chief Justice Marshall and review a few facts, the accuracy of which is demonstrated by printed records and statutes. We shall draw for our

matter upon authentic records of events and upon Federal Statutes antedating the "surprise" of 1803, instead of misquoting the decisions of the Federal Supreme Court or branding them as "shrewdly" perverse of the law, and also instead of adopting *obiter dicta* from socialist text-books.

That our fundamental law makes the enforcement of constitutional safeguards the primary function of the Judiciary, Federal and State, was demonstrated by Chief Justice Marshall in the famous case of *Marbury vs. Madison*, 1 Cranch, 137, in which, Chancellor Kent declares

"the power and duty of the judiciary to disregard an unconstitutional act of Congress or of any state legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration."

The limitations of the constitution were expressly made the supreme law of the land, binding upon all courts, federal and state, and with the duty, under oath, of every judge of every court to observe them as the paramount law of the land. Chief Justice Marshall demonstrated that, not only by express provision, but also by necessity, it was the duty of the courts to declare unenforceable a statute which contravened the Constitution. He said:

"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . A legislative act contrary to the constitution is not law."

It is urged by the socialists and by their coadjutors, the advocates of the judicial recall, that this decision by Chief Justice Marshall was a usurpation by, or arrogation to, the courts of a power not expressed and never intended to be enforced as a constitutional judicial function. No better answer to this claim can be made than the convincing arguments of Marshall in the case of *Marbury vs. Madison*. But that this was the interpretation of the constitution, upon the faith of which, more than any other single feature, the original states were persuaded to accept it, is shown by the various arguments of Ellsworth, Hamilton and others prior to its adoption. Hamilton urged in the *Federalist*:

“ There is no liberty where the power of judging be not separate from the legislative and executive power. . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the constitution void.”

Upon the same ground Ellsworth, on January 7, 1788, urged the ratification of the constitution upon the Connecticut convention, when he said :

“ If the general legislature should at any time overlap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorize, it is void ; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, or if they make a law which is a usurpation upon the Federal Government, the law is void ; and upright independent judges will declare it so.”

This doctrine of the judicial function had been prevalent in the states of the federation, prior to the adoption of the Federal Constitution, and had been recognized in the State of North Carolina where, in the case of *Bayard vs. Singleton*, Martin's Reports, page 42, it was advanced by Mr. Iredell, who was subsequently an Associate Justice of the Federal Supreme Court. Indeed, fourteen years before the decision of Chief Justice Marshall in the case of *Marbury vs. Madison*, and immediately upon the adoption of the Federal Constitution, the Federal Judiciary Act was passed by the First Congress under the constitution, expressly providing, as it has ever since provided, for the review in the Supreme court of the United States of the judgments of inferior federal courts, *as well as for the review of cases where the validity of state statutes or any exercise of state authority should be drawn in question, on the ground of repugnance to the constitution, treaties or laws of the United States, and the decision should be in favor of their validity.*

Now, how can any man, who is informed of the facts and who at the same time is sane and conscientious, for a moment say that the judicial function of declaring statutes unenforceable which are repugnant to constitutional prohibitions was usurped

or "created" through the decision of Chief Justice Marshall in 1803, and that theretofore it never existed in fact and was never before recognized and was never before intended to be recognized in our American jurisprudence? Why, not only had it been so understood by the states in their adoption of the constitution, but almost the first act of the American Congress under that constitution, and fourteen years before Chief Justice Marshall's decision, was to write that particular judicial function into the statutes of the United States and in the very form and wording in which it has ever since been expressed.

This act was drawn by Oliver Ellsworth, the third Chief Justice of the United States, and himself a member of the Federal Convention. Thus the First Congress confirmed that theory of the constitution, on the faith of which its adoption by the states was procured, and which was further confirmed and demonstrated by Chief Justice Marshall, in the first case in which it was passed upon by the Federal Supreme Court—that the question of the repugnance of a statute to constitutional prohibition is a *judicial question*, the determination of which belongs, under the constitution, to the courts; and that the final determination of the repugnance of a statute, federal or state, to the Federal Constitution belongs to the United States Supreme Court.

This charge of "usurpation" is a mere pretext for striking at the very keystone of our system of government.

#### A TRIBUTE TO SERVICE.

During the year this Association has lost, by death, some of its members who had been identified with the work of this committee—Wm. B. Hornblower, of New York; Albert W. Biggs, of Tennessee and F. M. Simonton, of Florida.

Mr. Hornblower, at the time of his death, had taken his seat upon the New York Bench, upon the appointment to which he closed two years of valuable service as a member of this committee. No single argument against the judicial recall has been more widely circulated nor more in demand than his address before the Yale Law School, in 1912, on "The Independence of the Judiciary—the Safeguard of Free Institutions."

Mr. Biggs was a conscientious and efficient worker in the cause of good government. He was one of the most enthusiastic and helpful members of this committee. He had made his influence felt throughout the nation as a staunch opponent of the judicial recall. Among his addresses the most notable is, perhaps, that given before the Texas State Bar Association in 1912 on "The Unrest as to the Administration of the Law."

Mr. Simonton was also for two years a loyal and active worker as a member of this committee, and never failed to respond adequately to any call for service.

#### BIBLIOGRAPHY.

Published discussions touching the judicial recall have become so frequent and so numerous that it does not seem advisable to continue in detail the bibliography which was set forth in our last report. As characteristic discussions, which are not included in our former bibliography, we note the following:

#### AFFIRMATIVE.

- "The Government of Men," presidential address by Professor Albert Bushnell Hart before the American Political Science Association, December 28, 1912. American Political Science Review, February, 1913.
- "Government by Judges," address by Chief Justice Walter Clark, of the North Carolina Supreme Court, at Cooper Union, New York City, January 27, 1914. Circulated in pamphlet form by the author.

#### NEGATIVE.

- "Popular Government—Its Essence, Its Permanence and Its Perils," by Wm. H. Taft. Yale University Press, 1913.
- "The Supreme Court of the United States and Popular Self-Government," by Wm. H. Taft, Phi Beta Kappa oration at Harvard, June 15, 1914. Harvard Graduate Magazine, September, 1914.
- "Public Opinion and Popular Government," by President Abbott Lawrence Lowell, of Harvard. Longman Greens & Co., New York, 1913.
- "The Place Occupied by the Judiciary in our American Constitutional System," address by Hampton L. Carson, of Philadelphia, before the Virginia State Bar Association, Hot Springs, Virginia, July 29, 1913.

The following are addresses made during the year by the Chairman of this committee:

- "The Recall of Constitutional Safeguards," address before Oklahoma State Bar Association at Oklahoma City, December 29, 1913.
- "The Election of Judicial Judgments," address before the Denver, Colorado, Bar Association, February 21, 1914.
- "Muckraking the Constitution," address before the State Bar Association of North Carolina at Wrightsville Beach, North Carolina, June 30, 1914; also delivered before Graduating Class of Law School of University of State of Indiana, at Bloomington, Ind., June 19, 1914; before Texas State Bar Association, at Dallas, Texas, July 7, 1914; and before Indiana State Bar Association, at Indianapolis, Ind., July 9, 1914.
- "The Dilemma of the Judicial Recall Advocate," address before the State Bar Association of Missouri, at St. Louis, Missouri, September 23, 1914.

#### RECOMMENDATIONS.

We recommend that the work of the American Bar Association against judicial recall be continued and that active co-operation by all members of the Association be given to its committee, and that liberal appropriations be made for necessary expenses.

Respectfully submitted,

ROME G. BROWN, Minneapolis, Minn., *Chairman*,  
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 EVERETT E. ELLINWOOD, Bisbee, Ariz.,  
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*Committee to Oppose the Judicial Recall.*





14  
REPORT

OF THE

## COMMITTEE TO OPPOSE JUDICIAL RECALL.

*(Presented at the meeting of the American Bar Association, at Salt Lake City, Utah, August 17-19, 1915.)*

*To the American Bar Association:*

The undersigned, appointed for the year 1914-1915 as your Committee to Oppose the Judicial Recall, respectfully submit the following report:

## THE CLIMAX OF JUDICIAL RECALL PASSED.

Our last report showed that the judicial recall agitation was already discredited through the propaganda of your committee against this doctrine of lawlessness. The American people had, in many localities, been induced to favor, and in some states to adopt, the proposition of judicial recall, either in the form of the recall of judges or of the recall of judicial decisions, or both. This movement was but a temporary and local result of the demagogic appeals to passion and prejudice which had been indulged in by certain agitators, some of them in high places, whose craze for change led them to become allies of socialism. For a time their hold upon the people was strong because their proposals for radical innovations, striking at the very foundation of our constitutional form of government, were forced upon the favorable consideration of voters through the prestige of the present or past rank of those who were urging them before the people. The contest between the advocates and opponents of judicial recall has been a contest between prejudice and enlightenment. In such a contest the ultimate advantage must be with those who represent conservative intelligence. The opposition to the judicial recall has been carried on by organized and persistent work in bringing home to the mind of the American citizen the true character of the measures which were proposed as a specific remedy for evils admitted to be present in the administration of justice. It was only necessary to discover to the American people the fundamental fallacy of judicial recall in order to insure its repudiation

as a possible remedy, and, indeed, its practical elimination from American politics.

From our experiences of former years it seemed to us a year ago that the then coming year would prove that the judicial recall had passed its climax and that the contest represented by your committee had been successful. Nevertheless, with the convening of over 40 state legislatures and with the advocacy of judicial recall then still persistent, we entered upon our year's work with many feelings of apprehension. The members of your committee have stood as outposts, each in his own state, to guard against further encroachments.

We are pleased to report that, during the past year, not only has no advance been made by the opposition, but that, on the contrary, we have been compelled to meet in only a few instances, and in those successfully, any activity from the other side. It cannot be said that the judicial recall is dead. So far, however, as concerns further progress at the present time, it is beaten "to a frazzle"; although that may not yet be openly admitted by some publicists whose bent of mind is so socialistic that judicial recall has with them become a hopeless chronic obsession.

#### REPORTS FROM THE STATES.

The latest reports show that in all of the states where there has been no special activity of judicial recall agitation there is less likelihood than ever that the question will be seriously agitated. In many states where the proposal had seriously been made to establish the judicial recall, but had been defeated, it has grown more and more in disfavor. In states where it has been attempted during the past year to extend its adoption, the measure has been defeated more quickly and by greater majorities than ever before.

In Kansas the constitutional amendment for the recall of public officials, including judges, which was submitted under the proposal of the legislature of 1913 for adoption by the people at the general election in November, 1914, was adopted. With this exception the states which have adopted the judicial recall in any form are the same as those enumerated in our report for the year 1912-1913. We think that it may be safely said that Kansas will remain the last state to adopt any form of judicial recall.

In Minnesota the constitutional amendment for the recall of public officials including judges, which was proposed by the legislature of 1913, was defeated at the general election in November, 1914, when it lacked about 40,000 votes of the number necessary for its adoption. This was after a special campaign of opposition, conducted under the direction of the Minnesota members of your committee, in which the prize arguments of a law school student and of a high school student, both sons of Minnesota, were widely and effectually used. At the same time the constitutional amendment, which was a part of the measure to increase the number of Supreme Court judges, by which more than a majority of the Supreme Court were made necessary to declare a statute unconstitutional, was defeated; and that for the reason that it thus limited the usual powers of the court. The Minnesota legislature of 1915 rejected a bill proposing a constitutional amendment for the recall of public officials, including judges. It passed a bill proposing a constitutional amendment to increase the number of Supreme Court judges from five to seven, but without any restriction, as adopted by the legislature of 1913, that it should require more than a majority to declare a statute unconstitutional. The attitude of the Minnesota legislature of 1915 toward the judicial recall, as thus shown, is emphasized by the fact that a constitutional amendment for the adoption of the initiative and referendum was passed. The latter bill renewed the proposition which had been defeated at the general election in 1914.

In the Massachusetts legislature of 1915 a bill was introduced by the only Socialist member providing for a constitutional amendment for judicial recall, but it received substantially no support.

In the North Dakota legislature of 1915 a bill proposing judicial recall was killed in the House, whereas two years before the same bill had passed the House by a majority of about two and one-half to one and had been finally killed in that legislature by a margin of only one vote.

In Colorado there is a large and growing sentiment in favor of repealing the constitutional amendments adopted in 1912 providing for recall of judges and recall of judicial decisions. The increasing reaction in that state against judicial recall has not.

however, as yet reached the point where it is advisable to press the matter of repeal. The delay may be advantageous, for in the meantime Colorado will continue to furnish practical demonstrations in support of the arguments which we have urged against the recall of judicial decisions. One example is significant: The constitution of Colorado empowers the city of Denver to control its own local affairs. Denver, therefore, comes within the judicial recall amendment, permitting the citizens of Denver by a majority vote to recall a Supreme Court decision involving the enforcibility of a city charter provision as against the state constitution. That constitution provides for prohibition throughout the state. The "Wets" are in a majority in the city of Denver; and in the contest which is now on between the "Wets" and "Drys" of Denver, the Supreme Court of the state will probably hold the constitutional state-wide prohibition clause to apply to Denver, whereupon the "Wets," within the city, will invoke the decision recall and by submitting such decision of the Supreme Court to the electors of the city will doubtless bring about its reversal. Many prohibitionists have heretofore strenuously advocated the judicial decision recall as adopted in 1912. They now see that it may result in at least a partial failure in Colorado of the prohibition movement; and that the idea of local option has been established, not only with reference to the liquor question, but also with reference to the question of the enforcibility of the decisions of the highest court of the state.

In California public opinion seems to be already tending to a repudication of judicial recall as adopted there. "The Pulse of the Pacific" on this question is shown by the following editorial in the current number of the "Sunset" magazine, under the title of "Intimidating Judges":

"There has been more or less trouble over franchise and trackage rights between the municipal and the private street railroad lines in San Francisco. This trouble culminated in July when the private company, after a full hearing, obtained an injunction against the use of certain tracks by the municipal lines. Through this injunction the municipal lines would lose a goodly share of their exposition business, and, in consequence, would have to discharge conductors and motormen.

"Twenty-four hours after the decision the labor union of the municipal railway employees began recall proceedings against the judge who had granted the decision. So loud grew the

clamor against the decision that the presiding judge of the superior court took the case out of the hands of the trial judge and, practically without a hearing, set the injunction aside. A second San Francisco judge to whom the case was to be assigned refused to accept the assignment.

"Is it more reprehensible to intimidate judges by political than by financial or social pressure? This question is asked without regard to the legal merits of the case."

In Nevada the movement for judicial recall has been turned into a movement to revoke recall of judges already adopted.

In Illinois the situation is summarized in the statement of a legislator who was formerly in favor of judicial recall, but who now says, "We have got done doing that sort of thing."

From Montana we hear that the matter was not mentioned in the recent state legislative assembly; "and were it not for the ravings of disgruntled Socialists it would die a natural death."

In New York it is reported "that owing to the militant attitude of the State Bar Association upon the subject, and the high standing of its members, who have presented a united front in opposition to this destructive vagary, such demand as heretofore existed for it in the State of New York is practically dead." The lawyers there have united in denouncing judicial recall as "a measure designed and used by aspiring and unscrupulous demagogues." While the present constitutional convention in New York invites the suggestion of many vagaries, there seems to be no disposition seriously to propose any form of judicial recall; and, considering the make-up of the convention, it may be expected that such proposal will not meet anything but overwhelming defeat.

Without mentioning other states in detail, the conclusion seems to be unanimous that there is now less than ever before probability of the further extension in this country of this fallacy; and that in the states where it has been adopted the general sentiment has turned in favor of a movement to rid the state constitutions of this experimental excrescence which has been grafted upon them. This change is exemplified in a report that comes from Connecticut where it is said "that the supporters of the judicial recall in any form are so few that it is difficult to find them with a microscope, except one or two of the leaders of the Progressive Party, and they are so mum about it that it would seem as if they

had forgotten there was ever such an issue." From Kentucky: "I believe judicial recall is dead. I believe interest in it has waned enormously, and that it is no longer popular. I believe it is thoroughly discredited. Inasmuch, therefore, as the people have been thinking on the question, and especially as they have begun to lean against it, I hope that it is the opportune time to improve judicial tenure," and from West Virginia where it is said that criticism of the courts has not yet led to the demand for radical change of judicial recall, but for less drastic remedies.

The report from Missouri seems to summarize the present situation throughout the country. There it is reported that in the legislature of this year no legislation was had, and no attempt was made at legislation, in favor of judicial recall: "The agitation for this measure is not only subsiding, but a very decided opposition to it has set in. The country is now on the road to have normal conditions restored and without renewed disturbance, unless the old time reactionaries, pure and simple, become overconfident and invite renewed disturbance."

It would be misleading to characterize the judicial recall movement as safely dead. It is down and out in the sense that a contestant is down and is taking the count. For some time yet there will be constant danger that neglect of the situation may find us suddenly confronted with a revived antagonist. This Association should not withhold any necessary means of safeguarding the situation.

#### POSSIBILITIES OF REVIVAL.

The persistence of this fallacy presents many possibilities of its revival, in one form or another. Within the past year the American Judicature Society has in the course of its work "to promote the efficient administration of justice," issued a bulletin which treats of proposed reforms in the organization of the courts. It proposes the abolition of the elective system of judges, and then, as a sop to the lingering predilection in favor of judicial recall, it is proposed to add to the present method of retirement of judges through impeachment, not only the right of removal upon charges made and adjudicated by the state legislature and by a judicial council, but also the retirement by a fourth method. By this fourth method it is proposed to sub-

mit to the electorate at certain intervals of time the proposition, "shall \_\_\_\_\_ (naming the judge) be continued in office?" If the vote is in the affirmative the judge remains in office. If in the negative, then the judge goes out of office and the vacancy is filled by appointment as in the case of original selection. It is argued that this last proposition is not in reality a judicial recall and that it simply preserves the present periodic power of retirement, existing under the elective system, at the same time that it eliminates many of the objectionable features of that system. It is quite probable that sooner or later the American Bar Association will be asked to approve such a proposition. That such a measure should be proposed by any society whose active members comprise well-known lawyers, is significant of the extent to which the judicial recall fallacy has taken hold. It shows that judicial recall is dead only in spots. This proposition bows too much to the enemy. It prescribes a poison in modified regular doses for the purpose of curing those who have become addicted in a dangerous degree to a vicious narcotic. It is a remedial tapering off, a sort of conciliatory concession, under the guise of a remedy, to a vicious appetite which had temporarily seized upon the electorate. Logically, it is impossible; and we trust that the American Bar Association will not be caught in a proposition to remedy the organization of the courts by the disorganization of constitutional government involved in any measure which gives over to the electorate the arbitrary power to retire a judge during the term of office for which he has been elected or appointed.

The National Progressive Constitutional Convention Committee, in New York, has, through its chairman, issued a threat to defeat at the polls any draft of a state constitution which does not conform to the views of that committee; and for this purpose, the manifesto says: "The National Progressive party will enter into battle to mass the electorate of the state, without regard to party, against the acceptance of a partisan or reactionary constitution." Among the demands embodied in the declaration are the following:

"There must be no clauses in the new constitution which can be set up as a bar to the initiative, referendum, and recall of officers; direct nominations for public officers by the electors, and legislation in the direction of social and industrial justice.



"Provisions of the constitution should ordain home rule for cities and villages; the short ballot, a rational method for determining the constitutionality of statutes that will give effect to the wishes of the people at any given time, and a declaration that there shall be no limitation upon the power of the Legislature to pass measures looking toward social and industrial justice."

The phrase, "a rational method for determining the constitutionality of statutes, etc.," is plainly a euphemism for the recall of judicial decisions. The judicial recall, therefore, may yet become an issue in the adoption of a new constitution in New York.

#### BIBLIOGRAPHY.

Important discussions, which do not appear in the former bibliographies of the committee, include the following:

#### AFFIRMATIVE.

"Some Myths of the Law," by Walter Clark, *Michigan Law Review*, November, 1914.

#### NEGATIVE.

"Responsibility of the Lawyer," by John M. Zane, address before the graduating class of the John Marshall Law School, Chicago, June 27, 1914.

"Vote 'No (X)' on the Proposal (No. 10) an Amendment to Article Seven (7) of the Constitution Providing for the Recall of Public Officials; to be submitted at the next General Election," by Harvey S. Hoshour of Duluth, Minnesota, and Arthur O. Lee of Madison, Minnesota, being the first prize arguments in two prize contests, (1) for students of the Minnesota law schools, and (2) for students of Minnesota high schools, against the Recall of Judges. These arguments were widely published and distributed in a successful campaign against the adoption of the constitutional amendment for the recall of public officials, including judges, proposed by the Minnesota Legislature of 1913, for adoption at the general state election in November, 1914.

Report of the New York State Bar Association Committee on the Duty of Courts to Refuse to Execute Statutes in Contravention of the Fundamental Law, presented January 22 and 23, 1915; S. D. 941, 63d Congress, 3d Session.

"The Citizen and the Constitution," by Alton B. Parker, 23 *Yale Law Journal* 631, June, 1914.

- “ Lord Mansfield: An Example to Those Who Would Undermine the Independence of the Judiciary,” by Harrison J. Conant, Green Bag, September, 1914.
- “ The Evolution of the Independence of the Judiciary.” Presidential address by Hampton L. Carson, before the Pennsylvania Bar Association, June 30, 1914.
- “ Judicial Power to Declare Legislative Acts Void,” by Oscar Hallam, Justice of the Supreme Court of Minnesota reprint from the American Law Review, 1914.

During the year the Chairman of this committee has made the following addresses:

- “ The Lawlessness of the Judicial Recall,” address before South Dakota State Bar Association, at Pierre, S. D., January 14, 1915.
- “ The Lawyer as Amicus Curiae,” address before graduating class of John Marshall Law School at Chicago, Illinois, June 22, 1915.

#### RECOMMENDATIONS.

We recommend that the American Bar Association maintain its organized opposition to judicial recall; and that the work of its committee be continued.

Respectfully submitted,

ROME G. BROWN, Minneapolis, Minn., *Chairman*,  
 LAWRENCE COOPER, Huntsville, Ala.,  
 EVERETT E. ELLINWOOD, Bisbee, Ariz.,  
 GEORGE B. ROSE, Little Rock, Ark.,  
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 CHARLES BLOOD SMITH, Topeka, Kans.,

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 EDWIN T. MERRICK, New Orleans, La.,  
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 WILLIAM L. MARBURY, Baltimore, Md.,  
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15  
REPORT

OF THE

## COMMITTEE TO OPPOSE JUDICIAL RECALL.

*(To be presented at the meeting of the American Bar Association, at Chicago, Illinois, August 30, 31, September 1, 1916.)*

*To the American Bar Association:*

The undersigned, appointed for the year 1915-1916, as your Committee to Oppose the Judicial Recall, respectfully submit the following report:

Since the last report of this committee, there has not been passed by a state legislature any measure providing for judicial recall, either in the form of the recall of judges or of the recall of judicial decisions; nor, during the past year, has any proposal for such a measure been submitted to the electorate of a state, either for the adoption of a constitutional amendment or otherwise.

It seems now reasonably certain that no state which has not already adopted a constitutional amendment providing for judicial recall, will do so. In order, therefore, to indicate the present situation in the United States, we next list those states in which judicial recall has become a constitutional provision, referring, for more detailed statement of the nature of the provisions, to the synopsis which is made part of the report of this committee for the year 1913.

## JUDICIAL RECALL MEASURES NOW IN FORCE.

Constitutional amendments, providing for judicial recall, either the recall of judges or of judicial decisions, or of both, are now in force in the following states:

OREGON.—Recall of judges. Constitution, Article II, Sec. 18. Adopted in 1908 under initiative by the people.

CALIFORNIA.—Recall of judges. Constitution, Article XXIII. Adopted in 1911.

COLORADO.—Recall of judges and recall of judicial decisions. Constitution, New Article XXI, and amendment to Article VI, Sec. 1. Adopted in 1912 under initiative by the people.

ARIZONA.—Recall of judges. Constitution, Article VIII, Sec. 1. Adopted in 1912.

NEVADA.—Recall of judges. Constitution, Article II, Sec. 9. Adopted in 1912. Facilitating legislation adopted in 1913—Chapter 258, Laws 1913.

KANSAS.—Recall of judges. Constitution, Article IV, Secs. 3, 4 and 5. Adopted in 1914.

#### REPORTS FROM THE VARIOUS STATES.

Reports from the various states, recently gathered, show that during the past year no attempt has been made at judicial recall legislation. The significance of this fact is shown by the nine states whose legislatures held sessions in 1916: New York, New Jersey, Maryland, Virginia, South Carolina, Georgia, Kentucky, Mississippi, and New Mexico. In none of these nine states, with the exception of New York, has the fallacy of judicial recall ever been seriously agitated as a constitutional amendment. The recent New York Constitutional Convention did not favorably consider any judicial recall proposition, although advocates of judicial recall had attempted to make that an issue in the convention.

The adoption in the United States of the judicial recall, as a state constitutional measure, is, as above shown, confined to six states west of the Mississippi River. It is in the western states, lying wholly or in part west of the Mississippi River, that judicial recall measures have been most seriously agitated and proposed. Its agitation seems to be an outcrop of western radicalism, although its subtle and subversive influence has appeared, some times with considerable strength, in Wisconsin, New York, Ohio, and a few other eastern states. It is probable that it is only in the far West that there is even a remnant of danger of its future adoption. Its agitation seems to follow, in all instances, some spasm of unrest over local conditions, either political or industrial. The propaganda of Socialism, now so prevalent and persistent in this country, and particularly in the far western states, continues to extend its influence to the advocacy of judicial recall. In many localities in the West there is, through the Socialist and other radical organizations, an organized effort to procure the

adoption of the judicial recall in the legislatures which will meet in 1917. Little is to be feared, however, from such attempts, because the intelligent voter has, through the agitation of this question, in the press and by other means, become informed as to what is meant by judicial recall. It has not been necessary, during the past year, for your committee to engage in any legislative contest on this issue. But we have continued our campaign of education and have promoted enlightenment on this question, through the press and through the distribution of literature.

In many of the mining camps of Colorado and other parts of the West, and in many rural communities, local libraries and reading rooms are flooded with Socialist publications, both periodicals and pamphlets; so that opportunities are given for reading only one side of this question. We have, in answer to many requests, supplied for such reading rooms and localities literature which presented the sane view of American constitutional government and of the destructive nature of the judicial recall. We are informed that our work has effected an obvious change in sentiment and has checked, to a considerable extent, the leaning towards the Socialist view of this question.

From Colorado, the report is that, with one exception, there has been no attempt during the past year to invoke the judicial recall; and that there has been such a change in sentiment there that, if the present constitutional amendments providing for the recall of judges and of judicial decisions were now for the first time presented for adoption, they would be voted down. There is not as yet any concerted effort to rid the state constitution of these radical provisions, but the people are looking forward to a revision of the constitution which shall eliminate these features.

Beside the instance occurring in California, mentioned below, the only attempt at judicial recall during the past year, which is reported to us, is the notable one in connection with District Judge H. P. Burke, of the Thirteenth District Court in Colorado. After a heated vituperative campaign against Judge Burke's candidacy he was elected, although his opponent was on the ticket of the majority parties. This was in the election of 1912, at which the Colorado recall constitutional amendments

were adopted. His political opponents openly threatened to use the recall against him as soon as possible. In other words, the judicial recall was to be used solely as an instrument to unseat a political opponent. The judge's political enemies seized upon an incident at a certain criminal trial, at which this judge presided, as a pretext for their recall agitation. Judge Burke granted a new trial after conviction in the criminal case; the propriety of which conviction was so questionable that the district attorney in open court approved of the judge's action, and presented in substance an apology for having proceeded thus far with the prosecution. Indeed, the district attorney voluntarily filed a motion to dismiss the case with a written statement of his reasons. Under the Colorado statute there was no discretion left to the judge and he, as a matter of course, granted the motion. The political enemies of the judge, including certain citizens back of the prosecution in the case referred to, prepared recall petitions, collected funds from among themselves and various other disappointed litigants, and circulated in the public press, and by other means, calumniations against the judge. Circulators of the petitions received a price for each name procured, and the leaders of the recall movement directed their followers, and circulators of petitions, by letter, to keep away from centers of population and places where they might encounter men well informed on the matters in question. Inflammatory circulars and newspaper articles were scattered broadcast throughout the district. The State Bar Association, after examining the facts, upheld the judge. As a result a recall petition was filed with the Secretary of State apparently having the required number of signatures; but, before further action, over 25 per cent of the signers withdrew their signatures. The protest against the petition was upheld. The grounds set forth in the recall petition were as follows:

“First: We are advised, and therefore charge, that in his capacity of judge of said court, in the case of the People *vs.* ———, lately pending in the District Court of ——— County, Colorado, he arbitrarily, unjustly and in an unjudicial spirit, set aside and held for naught the verdict of ‘guilty’ rendered by the jury; and,

“Second: That he indulged in unbecoming and inexcusable criticism of the jury in that case.

“Third: That upon the bench he is disposed to uncleverness [sic?] and only less frequently to arbitrary and oppressive conduct.”

It is apparent that the action of Judge Burke, in the criminal case referred to, was not only not “arbitrary” but was justified. A careful examination of the remarks of the judge at the time of trial shows that the second ground was wholly without warrant. The third charge, that he was “disposed to uncleverness, etc.,” is negatived by almost unanimous support which he received from the members of the Bar.

From California, the report is that during the past year there has been only one attempt, and that unsuccessful, to invoke the judicial recall. This was the case of a Superior Court judge in one of the northern counties. It is stated that the judicial recall in California is in such disrepute as to be practically harmless. In that state, however, the State Federation of Labor is pursuing a campaign to commit candidates for the United States Senate and House of Representatives to the recall of federal judges.

The judicial recall, and the recall generally, are growing in disfavor in California. Here again its only use is to satisfy the whim of political malcontents. Upon the election of Mayor Rolph, of San Francisco, former mayor Schmitz threatened to start recall proceedings against Rolph, and himself become a candidate for the office again. In commenting upon the recall in this connection, the *Oakland Tribune* of April 30th, last, says:

“It is another striking example of the vicious and stupid misuses of the recall. Any individual can trump up a dozen charges, get paid circulators to secure the ridiculously small number of signatures required on the recall petition and then start to outrage a municipality. . . . Self-seeking schemers are fast bringing the recall into disrepute, and if the citizens would preserve this very useful instrument for their protection they must awake to the necessity of putting it above motives of malice, revenge and club-wielding.”

In Washington, the constitutional amendment of 1911, for the recall of elective officers, excepts all “judges of courts of record.” This allows legislation providing for the recall of justices of the peace, and of the judges of police, and of other local and municipal, inferior courts. Such recall has not been in-



voked against any inferior judge and, except on the part of a few extreme radicals, there is no active sentiment favoring judicial recall for the higher judges. The recall of judicial decisions is mentioned only with contempt and ridicule.

In North Dakota, there is a current agitation on the part of the so-called "Non-Partisan League," an organization of farmers in that state which is being quite prominent in politics and is advocating as part of its platform the recall of judges. This league will show its hand in the primary election of the 28th of June instant, and also in the elections next fall for the legislature of 1917.

In Arizona, there has been no attempt to invoke the judicial recall, but there is reported an instance of recall, not judicial, against a sheriff, of Pima County, because of the conduct of his deputies. The report says:

"In the first instance, two deputies attempted to administer the third degree to two criminals by hanging them by the neck to a tree. They were unsuccessful in securing any evidence owing to the fact that the deputies let the men remain so long hanging by the neck that they died.

"In the second instance, two deputies, in pursuit of some alleged criminal for a minor offense, attempted to stop a woman driving peacefully along the street, believing she knew something of the escape of the supposed criminal, and their aim was better than they calculated, by reason of which she was riddled with bullets."

Public opinion was unanimous in favor of the sheriff's recall, but the recall statute, when it came to be applied, was found so cumbersome and unworkable that the recall election was enjoined by the courts. The public sentiment in Arizona is changing to opposition to recall.

In Arkansas, a constitutional amendment for the recall of judges, which was initiated by the people, was passed at the 1912 election, but was invalidated by the State Supreme Court on the ground that it had not been properly submitted to the people. The 1915 legislature, however, closed without renewing the proposal; and, in the meantime, sentiment has so changed that it seems probable that no further attempt at judicial recall will be made in that state.

In Minnesota, the legislative proposal for a constitutional amendment for the recall of judges was defeated at the general

election in 1914; and the legislature of 1915 rejected another proposal, in connection with the increase of Supreme Court judges from five to seven, that more than a majority of the court should be necessary to declare a statute unconstitutional.

In Oregon, the situation is well summarized by the *Nation* in its number of June 8th, last:

"The theory that the recall is a sort of handy 'gun behind the door' is not borne out by conditions in Oregon. A number of recall elections were held at the same time as the recent primaries. All of them were caused by the tremendous issue of what roads should be benefited by the money that the county concerned was going to spend upon its highways. People in every section insisted that the money should be spent upon their road or roads, and the county commissioners, having to leave out somebody, inevitably became the object of recall petitions. One county had the piquant experience of recalling one set of commissioners, only to find that the new set was not able to please everybody any more satisfactorily than the board it had succeeded in ousting. With impartial justice, the recallers were promptly placed upon a ballot to recall them. In consequence of this uncertainty, in which the only certainty is that of making enemies, 'many worthy citizens,' according to the *Oregon Voter*, are refusing to be candidates for these offices. But if a man may not decline to run for President in Oregon, surely he should not be permitted exemption from a county commissionership."

#### THE SITUATION GENERALLY.

There is a very significant change in the attitude toward judicial recall which has been previously assumed by many of its former leading advocates.

Ex-President Roosevelt has taken pains to assert that his intention not to "pussyfoot" on the issues previously raised by him, does not include his adherence to the judicial decision recall. Indeed, he has said that, even if he had been elected in 1912, he would not have recommended that the judicial decision recall plank in the "Progressive" party platform be enacted into legislation, because such a law would be "cumbersome." The platform of the same so-called "Progressive" party, recently adopted at Chicago, studiously omits any direct mention of the judicial recall. In its platform of 1912, however, under the head of "Popular Review of Judicial Decisions," it pledges

itself to provide that decisions holding state statutes unconstitutional could be made ineffective by a vote of the people. The platform of 1916, by reference, reaffirms this recall of judicial decisions plank; for, referring to the platform of 1912, it says: "In the platform then adopted, we set forth our position on public questions. We here reaffirm the declarations there made on national issues."

The two who have next been most conspicuously advocates of the judicial recall are supreme court judges; the one in Ohio, and the other in North Carolina. Their present comparative silence as to judicial recall is also significant. In the *Saturday Evening Post* of June 10th, last, Judge R. M. Wanamaker, of Ohio, reiterates his claim that the courts have no constitutional power to declare statutes invalid, as repugnant to constitutional limitations. But he carefully avoids any advocacy of judicial recall as a correction for the abuse or "usurpation" of power by the courts. Indeed, he expressly refers to the recall of judges and the recall of judicial decisions as ineffective to accomplish their avowed purpose, and as difficult in practical operation. He readjusts his argument to lead to the conclusion, that courts should be prohibited from declaring statutes unconstitutional by a mere majority vote, and that the Federal Supreme Court should by constitutional provision be allowed to declare any statute unconstitutional only by a vote of at least seven out of the nine judges.

Chief Justice Walter Clark, of North Carolina, in his recent discussion in the *Virginia Law Review* (Volume III, No. 3), and reprinted as a Senate document last February, (No. 308, 64th Congress, 1st session), seems to have given up the judicial recall, either in the form of recall of judges, or recall of judicial decisions, as a means of judicial correction or discipline; and he centers his argument upon a denial of the constitutional right of courts to declare statutes unconstitutional. In another recent discussion of the subject by Judge Clark, however, which for further circulation he has now (May 31, 1916) had printed as a United States Senate document, he impliedly approves of the recall of judges as a doctrine by which "the people have been forced to assert ultimate sovereignty," as against the "myth" that the courts have the power to set aside an Act of Congress,

or of a state legislature, as unconstitutional. Furthermore, he includes the recall of judicial decisions as a "remedy" which is "less objectionable" than the remedy by the recall of judges. He impliedly approves the so-called "Ohio plan," which is the remedy urged by Judge Wanamaker—that the unanimous, or more than a majority, decision of a Supreme Court be required to set aside a statute as unconstitutional. "Some Myths of the Law," Michigan Law Review, November, 1914, page 26; U. S. Senate Document, No. 449, 64th Congress, 1st session.) Judge Clark's views are summarized by him as follows:

"Suffice it to say that the true basis of our government is that the people are capable of self-government, and that their will, fairly ascertained, shall control. We have never given to the judges the 'judicial veto' power. It has been assumed, but it cannot be maintained. It makes of the courts small legislative bodies which may be appointed, or nominated, by the special interests. The question then is squarely presented which shall control, the 'interests' or the body of the people? One must know little of the temper of the American people if he believes that this myth can long survive the fierce light that is being shed upon it.

"The demand for reform in legal procedure and of the abuses incident to our practice is insistent. It must be heeded. Their importance, however, is small compared with the necessity of abandoning the usurped power by which the courts have become legislative bodies, able and anxious too often to thwart the will of the people as to their public policies when this has been declared by them at the polls in selecting their duly constituted agents for making their laws."

This adherence to the theory that the judicial function of measuring the validity of statutes by the express rule of the constitution is a "usurped" power, has incited the New York State Bar Association, through its committee and under the tireless and very efficient leadership of Chairman Henry A. Forster, to compile and report the main arguments against the "usurpation" theory. Two such reports have been issued, entitled, "On the Duty of Courts to Refuse to Execute Statutes in Contravention of the Fundamental Law." The first report was presented to the State Bar Association on January 22-23, 1915, and has been printed as a United States Senate document (No. 941, 63d Congress, 3d session). The second report was presented on

January 14-15, 1916. These reports are a complete answer to the "judicial usurpation" theory, if any further answer be needed than that given by Judge Marshall in his decision in *Marbury vs. Madison* (1 Cranch, 137).

The plan of the American Judicature Society, which involves judicial recall features, was outlined in our last report. The literature of that society, issued during the past year, indicates an adherence to the objectionable features of its proposed reforms in the organization of the courts. Its proposition to retire judges by votes submitted to the electorate at certain intervals of time, is being persistently urged before various state legislatures. It is urged by the society that its plan should "not be confused with the proposal for the so-called 'recall' of judges to which it bears a superficial resemblance." The fact remains, however, that the plan suggested involves the retirement of a judge by the arbitrary vote of the electorate, and that, too, within the period for which such judge has been selected. Such use of the recall cannot be likened to the privilege of reelection of a judge after the latter's term has expired. The objectionable feature is the arbitrary power in the electorate to retire a judicial officer while he is yet in the performance of his duties, and before the expiration of his term of office (see Bulletin X, American Judicature Society).

The work of this committee during the past year has been much less than that which has been required in previous years. This is due partially to the fact that the legislatures of only nine states, and all of these Eastern States, have been in session. But it is due mostly to the fact that a more general understanding of the viciousness of the judicial recall has become prevalent throughout the country; and thinking people, and the press generally, are not deceived by the subtle and enticing arguments of the judicial recall advocate. The citizens of the nation have become educated on the matter; and this process of education, we feel justified in saying, is very largely due to the work of the American Bar Association through the efforts of its prominent members and officers, and, in no small degree, to the continued efforts of this committee, especially appointed for that purpose.

We have thought it unnecessary to continue in our report the usual annual bibliography of the subject. Arguments against

judicial recall are constantly appearing in printed addresses, pamphlets, periodicals, and the daily press. As shown above, those who were formerly its leading advocates are now comparatively silent upon the question. Its advocacy is now confined to those who are uninformed, or who have been incited to radical and unreasonable views on constitutional questions.

It seems that, from now on, the opposition to the judicial recall is more than ever a matter of education. It would seem that such work could not be more effectively accomplished than through the continued efforts of this Association. Its committee as now organized includes a member from each state who is alive to the question. Such a committee, therefore, affords an organized means of keeping fully informed on the subject, and with organized methods of attack where such efforts shall be deemed necessary.

#### RECOMMENDATIONS.

We recommend that the American Bar Association maintain its organized opposition to judicial recall; and that the work of its committee be continued.

Respectfully submitted,

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 LAWRENCE COOPER, Huntsville, Alabama,  
 ROYAL A. GUNNISON, Juneau, Alaska,  
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 MANUEL RODRIGUEZ-SERRA, San Juan, Porto Rico,  
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 P. ALSTON WILLCOX, Florence, South Carolina,  
 U. S. G. CHERRY, Sioux Falls, South Dakota,  
 JOHN B. KEEBLE, Nashville, Tennessee.  
 ROBERT G. STREET, Galveston, Texas,  
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 D. J. F. STROTHER, Welch, West Virginia,  
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# REPORT

OF THE

## COMMITTEE TO OPPOSE JUDICIAL RECALL.

*(To be presented at the meeting of the American Bar Association at  
Saratoga Springs, N. Y., September 4, 5, 6, 1917.)*

*To the American Bar Association:*

The undersigned, appointed for the year 1916-17, as your Committee to Oppose Judicial Recall, respectfully submit the following report:

During the past year, no direct judicial-recall measure has been adopted by any legislature, either state or national, and, in none of the states having judicial-recall provisions, has any attempt been made to enforce judicial recall, either in the form of the recall of judges or of judicial decisions. While none of the existing judicial-recall measures, whether constitutional or legislative, have been repealed, public opinion has been everywhere showing itself as more and more against measures, whether proposed or already enacted, which provide for a direct recall, either of judges or of judicial decisions.

This change of sentiment is due to a large extent, we believe, to the activities of this committee, through its persistent propaganda of education upon the functions of the judiciary, and upon the maintenance of its independence as the keystone of our constitutional government.

The menace of the judicial-recall fallacy, however, still persists; and your committee has directed its activities, during the past year, to combating certain theories and measures which have for their object either direct or indirect judicial recall, as a means, in connection with other allied means for the same purpose, to weaken or destroy constitutional safeguards. Such work by this committee is well within the scope of its defined duties which, as we view them, include opposition, not only to the direct recall of judges or of judicial decisions, but also such opposition as would represent the general sentiment of



this Association to any deliberate and organized attack upon the independence of the judiciary, or upon the exercise by the judiciary of those functions which are primarily imposed upon judges by the fundamental law of this country for the very purpose of preserving constitutional protection to the life, liberty and property of its citizens.

#### THE SUPERANNUATION OF FEDERAL JUDGES.

In line with its duties as thus viewed, this committee is opposing the passage by the Congress of the bill introduced by Senator Smith of Georgia, providing for the involuntary retirement of federal circuit and district judges. The Federal Judicial Code (Sec. 260) provides that the judge of any United States Court, having held his commission at least ten years and having reached the age of seventy years, may resign upon full pay.

This bill (S. 706, 64th Congress, 1st Session) provides that, in case such judge so entitled to resign does not resign, nevertheless, the President "if in his opinion the public good so requires" may, in the case of circuit judges, with the advice and consent of the Senate, appoint a new judge who shall "relieve" the judge so entitled to resign from the duty of sitting as one of the judges of the circuit court of appeals; but the judge so "relieved" may be designated to perform the duties of judge at the discretion of the senior circuit judge or of the Chief Justice of the United States Supreme Court. In the case of district court judges, so entitled to resign, the President "if in his opinion the public good so requires" may appoint, with the advice and consent of the Senate, an additional judge, who shall supplant the judge so entitled to resign and the latter judge shall henceforth be "relieved" from service, subject to his being designated for certain services at the discretion of senior presiding judges.

The effect of this measure is, in substance, to give to the President the power to recall any circuit or district judge who has reached the age of seventy years and has served continuously for ten years. It attempts to disguise the purpose of arbitrary "removal," or recall, of the judge by the phrase "shall thenceforth be relieved from service." There are thirty-three

United States circuit judges and ninety-five district judges, a majority of whom are over sixty years of age and very many of whom are over seventy. In the case of a judge, the history of the bench of this country shows that, in many instances, his best work is done after he has reached his three score years and ten. After he has reached that age, and particularly after ten years continuous service, he has, of course, demonstrated whether his trend of mind is consistent with the views of the person who at the time may hold the office of President. The arbitrary power thus attempted to be given to the President of retiring a judge who hesitates or refuses to resign will always constitute a menace to the independence of the judiciary, no matter how wisely such power of recall might be exercised. It savors of the ancient prerogative of the English King, by the exercise of which the judicial decision of a judge could, in advance of its rendition, be dictated by the King, and by which any recalcitrant judge could be arbitrarily removed, if his decision did not suit the whim of his sovereign.

The unconstitutionality of this enactment is apparent. The power of the Congress to create or abolish courts is one thing; but its power to interfere with the official tenure of judges is entirely different. The federal Constitution permits one and prohibits the other. Section 1 of Article III of the Constitution expressly provides that federal judges "shall hold their offices during good behavior," subject to removal only by impeachment. The object of that constitutional provision was to prevent arbitrary interference, by either the executive or legislative branches of the government, with the independent exercise of its duties by the judicial branch of the government. To "relieve" one judge of his service and to appoint another in his stead for the same service, all at the discretion of the President and the Senate, is, in effect, to grant to the President a power of removal, contrary to the fundamental law.

#### THE SOCIALIST MENACE.

The propaganda of Socialism, which is now so wide spread and very active throughout the country, is, from its political viewpoint, one of attack upon constitutional government, and particularly upon the tenure and functions of our judicial de-

partments, state and national. It is promoted, not alone by the avowed Socialist, but by numerous allies, comprising many who would disavow the name of "socialist." These socialistic influences are exerted by many forms of organization, social and political. The socialist political platforms continuously advocate, as the first necessary means of establishing Socialism, the adoption of the judicial recall. The ultimate object of Socialists is the confiscation of property and property rights and the turning over of all property to common ownership in the name of the state. They must first, then, eliminate that judicial function which was established in this country to safeguard the life, liberty and property of the individual. They would abolish the United States Senate and all courts, as now established; and they urge the abolition of the power "usurped" (as they say) by the Supreme Court of the United States to pass upon the constitutionality of legislative acts, and the revision (presumably upon the socialist basis) of the Constitution of the United States. They regard the only power which is established to enforce constitutional limitations as a power "usurped" by the courts themselves, in derogation of the rights of citizens; for they recognize the fact that it is this so-called "usurped" power by the exercise of which the individual rights of property and of liberty, vouchsafed by our constitutional government, are safeguarded, and that so long as this power is exercised by a free and independent judiciary the establishment of a new and different system of government, based upon the common ownership of everything, is impossible. The judicial function of declaring invalid any statute which contravenes constitutional safeguards to individual rights of property and liberty is, so long as it continues, a barrier to the establishment of a government of Socialism. The attack upon this function made by the Socialists is of two kinds.

They would have the judiciary itself, including the United States Supreme Court, reverse the decision of Chief Justice Marshall in the case of *Marbury vs. Madison*, and in all the subsequent cases based upon that decision, and, by judicial construction, leave the express constitutional limitations as mere scraps of paper announcing rules of conduct which are to be honored or dishonored at the whim or caprice of a voting

majority at any time or in any locality. For the determination of the question of constitutionality of any statute, they would substitute, in the place of the careful *judgment* of a tribunal of triers experienced and learned in the law, the arbitrary and capricious *pre-judgment* of comparatively incapable arbiters declared at a mass meeting or at a referendum election.

Doubting the voluntary surrender by the courts of this established function, the Socialists advocate the express denial by constitutional amendment of the power of the courts to invalidate legislation as repugnant to constitutional limitations. An active propaganda in promotion of such change is now carried on throughout the country; and it is participated in by avowed Socialists and by others, who are, either directly or indirectly, the allies of Socialism.

The menace of this socialist attack upon our judicial system is not merely potential or theoretical. Its influence has already been so extended that means of enlightenment as to the dangers of this socialist fallacy have been organized by the bar associations of the nation and of the states. A propaganda of education as to our constitutional government has for six years been carried on by the American Bar Association through its Committee to Oppose Judicial Recall. For over three years a special committee of the New York State Bar Association "Upon the duty of courts to refuse to execute statutes in contravention of the fundamental law," under the efficient chairmanship of Henry A. Förster of the New York City Bar, has rendered valiant service in the same cause. (See first, second and third reports of that committee, presented at the annual meetings of the New York State Bar Association in January, 1915, 1916 and 1917.)

Back of every attempt to weaken or eliminate the judicial function, or to diminish the independence of the judiciary, the socialist agitator is always found most active. So the Socialist supports the proposition, which has been made part of the Ohio Constitution and is sought to be applied in all national and state courts of review, to compel either a unanimous, or more than a majority, opinion of an appellate court to declare a statute invalid on the ground of its repugnance to constitutional provisions. For the same reason it has become a plank in the socialist political platform that all judgeships be made elective,

and that, too, only for short terms. Ultimately they would eliminate the judicial function; but, until that object is accomplished, they would resort to every possible step leading to the weakening of the judicial power.

The State of North Dakota is now, and has been for two years practically in the control of a socialist organization known as the farmers' "Non-Partisan League." Many of its measures, socialistic in their nature, have been carried through the state legislature, and a new socialist state constitution has been proposed, and was nearly passed in the last legislature, whereby state socialism was to be established, under which the State, or any political subdivision thereof, should have the right "to engage in any occupation or business for public purposes." The object was in the first instance to take over to the State all elevator systems, flour mills, "and other things of a like nature." Besides provisions for initiative, referendum and recall, including judicial recall, there was also proposed the constitutional provision that:

"No act, law, bill, measure or resolution, or part thereof, adopted by vote of the people shall be held unconstitutional, or come within the veto power of the Governor, or be amended or repealed, except by the vote of the people."

This socialist movement, under the guise of a farmers' "Non-Partisan League," which started and established itself in North Dakota, is extending its organization into other States west, and into Minnesota and other States east.

Tendencies such as are represented by the movements above referred to receive assistance from many sources which are not directly allied with Socialism. The Socialist pretends to spurn the charge of anarchism and of the purpose of change by violence. Nevertheless, the worst elements of the I. W. W. are found allied with socialist lobbyists when revolutionary measures, or revolutionary methods of legislation, are attempted to be imposed upon the Congress, or upon some state legislature. Evidence of this was shown during the last sessions of the legislatures of Minnesota, North Dakota, and other States.

So far as these organized efforts tend to overthrow the judiciary or tend to replace the independent and free exercise of the judicial function with the fiat of the whim or prejudice or

passion of the mob, whether it be accomplished at the polls or by intimidation of the legislator or of the judge, it has been the purpose of this committee to place before the voter such material and argument as may aid in solving the questions involved and to promote an enlightened appreciation of the importance of preserving the essentials of the judicial function and of maintaining the independence of the judiciary.

The chairman of this committee, in the annual address to the Louisiana State Bar Association, at Alexandria on May 12, last, took the opportunity then afforded of presenting, somewhat in detail, his views as to the extent and significance of the present menace of Socialism to our constitutional government.

We believe that this committee should be maintained for further work upon the lines herein suggested.

#### RECOMMENDATION.

We recommend that the American Bar Association continue its organized opposition to Judicial Recall, and to allied measures, by maintaining its special committee for that purpose.

Respectfully submitted,

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LAWRENCE COOPER, Huntsville, Alabama.

ROYAL A. GUNNISON, Juneau, Alaska.

EVERETT E. ELLINWOOD, Bisbee, Arizona.

GEORGE B. ROSE, Little Rock, Arkansas.

CURTIS H. LINDLEY, San Francisco, California.

FRANK E. GOVE, Denver, Colorado.

WILLIAM BROSMITH, Hartford, Connecticut.

ROBERT PENINGTON, Wilmington, Delaware.

CLARENCE R. WILSON, Washington, District of Columbia.

WILLIAM A. BLOUNT, Pensacola, Florida.

ALEXANDER R. LAWTON, Savannah, Georgia.

DAVID L. WITHINGTON, Honolulu, Hawaii.

JAMES H. HAWLEY, Boise, Idaho.

GEORGE T. PAGE, Peoria, Illinois.

SAMUEL O. PICKENS, Indianapolis, Indiana.

E. M. CARR, Manchester, Iowa.

CHARLES BLOOD SMITH, Topeka, Kansas.  
 EDMUND F. TRABUE, Louisville, Kentucky.  
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 JAMES S. SEXTON, Hazlehurst, Mississippi.  
 CHARLES NAGEL, St. Louis, Missouri.  
 D. GAY STIVERS, Butte, Montana.  
 WILLIAM D. MCHUGH, Omaha, Nebraska.  
 HUGH H. BROWN, Tonopah, Nevada.  
 JAMES SCHOULER, Intervale, New Hampshire.  
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 A. T. CLEARWATER, Kingston, New York.  
 HARRY SKINNER, Greenville, North Carolina.  
~~HARRISON A. BRONSON, Grand Forks, North Dakota.~~  
 CHARLES B. WILBY, Cincinnati, Ohio.  
 JAMES R. KEATON, Oklahoma City, Oklahoma.  
 FREDERICK V. HOLMAN, Portland, Oregon.  
 RODNEY A. MERCUR, Towanda, Pennsylvania.  
 MANUEL RODRIGUEZ-SERRA, San Juan, Porto Rico.  
 THOMAS A. JENCKES, Providence, Rhode Island.  
 P. ALSTON WILLCOX, Florence, South Carolina.  
 U. S. G. CHERRY, Sioux Falls, South Dakota.  
 W. M. CROOK, Beaumont, Texas.  
 EDWARD B. CRITCHLOW, Salt Lake City, Utah.  
 GEORGE B. YOUNG, Montpelier, Vermont.  
 EPPA HUNTON, JR., Richmond, Virginia.  
 CHARLES E. SHEPARD, Seattle, Washington.  
 D. J. F. STROTHER, Welch, West Virginia.  
 BURR W. JONES, Madison, Wisconsin.  
 MARION A. KLINE, Cheyenne, Wyoming.

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# Recall *of* Judges

Argument in Opposition

Presented before the Minnesota State Bar Association  
at its Annual Meeting

Duluth, Minn., July 19, 1911

By Rome G. Brown

Minneapolis, Minn.





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July 19th, 1911

By Rome G. Brown  
Minneapolis, Minn.

*Mr. President and Members of the Minnesota State Bar Association:*

I had not expected to take part in this discussion which, several weeks ago, was announced for to-day, and it was not until I was just leaving for this meeting that I was asked for the first time to represent here the opposition to the judicial recall. With the time allotted for presentation, and with the short notice I have had, it will be impossible for me to attempt anything like a comprehensive or even consecutive statement of the insurmountable objections which I have become convinced exist against this measure, but which I have never before attempted to formulate. I ask your consideration of certain reasons why the judicial recall, whether it be applied to the state or the federal courts, is repugnant to reason and to the fundamental law of this country.

## THE QUESTION INVOLVED.

The question involved is, in short: "Shall we have in this country as to any judiciary, either state or federal, the recall of judges?" The practical question presented is this, and nothing more nor less than this, to-wit: "Shall voters of a judicial district be given the power, arbitrarily and without cause, at any time, by popular vote, to unseat a judge who has been elected or appointed to a position upon the bench, and to fill his place by another whom, at the time, the voters may deem more agreeable?" This is the practical question involved; for, as I shall point out, the recall of judges by a direct vote of the people, if it exists at all, must be an exercise of an arbitrary power by the people, and any attempted interjection of a consideration of alleged causes or grounds for the recall, in order to make the power of recall anything else than a purely arbitrary one, gives only a mere pretense of a safe-guarding element which can exist only in theory, and is impracticable and futile.

#### HISTORICALLY CONSIDERED.

There is no precedent in history prior to the present century where this power has existed in a republican form of government. The earliest instance of the exercise of this power of which we read is that of Aristides, in the pure democracy of the Athenian government in the fifth century before the Christian era. Aristides, as First Archon, held a position which largely corresponded with that of the chief justice of a high court, although he had also certain duties of an executive nature. The process, decrees and orders of the entire body of Archons ran in his name. His judgments were so fair that he had gained throughout Greece that reputation which then made him noted, and has since made him noted, for his wisdom, integrity and impartiality. The Grecian demos, the people, had the power, and the arbitrary power, at the polls to deprive of his office and drive from the country by a vote upon shells,—that is, to “ostracize”, any citizen or officeholder. You will also remember that, when the vote to ostracize Aristides was being taken, an ignorant Athenian of the lower ranks went to the polls for the purpose of voting against Aristides, and chanced to meet the latter who was unknown to him except by reputation. He asked Aristides to write a name upon a shell and to write “Aristides.” Not disclosing his identity, Aristides asked the Athenian if he had any grievance against this man against whom he was casting a vote. “No,” said the Athenian, “but I am impatient of hearing him called ‘The Just.’”

This historical incident which is handed down to us from ancient Grecian history, is doubly and trebly significant at the present time. *There* was a judicial recall, under a democracy, placed with the people, arbitrary in its character; and voters who had never heard of any grievance, who much less had any grievance of their own, were exercising the power of recall. More than that, the secret enemies of the judge, actuated by jealousy or by selfish ambition of persons or factions, had spread abroad among the people a prejudice against the judge to the extent that his very qualifications for his position,—those of wisdom, integrity, and a sense of justice,—even the reputation for those high qualities, had become the pretext and even the avowed basis for his ostracism. The cry of the agitators and the demagogues had gone forth among the multitude; wilful machinations had brought about a feeling of discontent, even to the majority. Without cause, against reason, and without a hearing, a prejudice of the people, artificially and maliciously created, pulled down from his position an upright judge and expelled him for a time from his country. Thus, under a government which was purely democratic, neither monarchical nor republican in form, we have an example of the tyranny of democracy,—a tyranny which is more absolute and more dangerous than even any tyranny of monarchy.

Prior to the eighteenth century, the King of England had the arbitrary power of unseating a judge; but that power was taken away by the Act of Settlement passed eighty-seven years before the Constitution of the United States was framed. Before that, in England, the tyranny of monarchy extended to the judicial office; but ever since

then the tenure of office of English judges has been during good behavior, removable only upon the address of both houses of Parliament. This is equivalent to our impeachment by the legislature. Although under despotisms and monarchies, the power of the recall of judges has in many instances been retained by the executive, there is no instance, so far as I am able to find, where ever, since most ancient times, under any government, either republican or democratic in form, the judicial recall by a popular vote has prevailed. Even in Switzerland, where there are no constitutional limitations upon legislation, and where the powers of legislation lie directly with the people, and that, too, by direct vote, the tenure of office and the independence of the judiciary are carefully protected. For over 2,000 years, the peoples of all republics have recognized the evils and the dangers of the tyranny of democracy as even more destructive of the integrity of the judiciary, than any tyranny of a monarchical sovereign wielding the power of judicial recall. Not until these late years of the 20th century in our own country, do we find such a measure advocated, and that, too, in what has been assumed to be the most advanced and civilized republic which has ever been established.

The main purpose of our present form of government was to establish a system which should protect the people, not merely from the abuses and evils of the tyranny which they had suffered under the monarchical rule, but, what was even more important, to guard against the evils and abuses which inevitably arise through an unrestrained power of the people, and to guarantee under a new system, not only to the people of the nation but to the people of each state, a certain protection with respect to some, at least, of their personal and property rights. So it was that the federal constitution contained express limitations upon the powers of the executive, and particularly of the Congress, and each state constitution provided similar limitations upon the executive and legislative powers; and again the federal constitution fixed the limitations upon the power of any state, by legislative act or by constitutional provision, with regard to violating certain personal and property rights of any citizen. The insufficiency of the form of government laid down in the Articles of Confederation and the inconsistency of the provisions of those Articles with a system which was deemed necessary to insure a stable and properly balanced form of government, were recognized; and it was to eliminate these insufficiencies and these inconsistencies,—among which was the arbitrary power of recall by a state of its delegates to Congress (Art. V, Art. Conf.)—that the present form of government, with its express constitutional limitations, was established.

From this fact of written and limited constitutions, state and federal, arose the exceptional importance, under our form of government, of the third department,—the judicial. From this fact arose, also, the necessity that the judicial department of the government, whether state or federal, should be not only separate, but absolutely independent. Its function was not merely, as under governments with unlimited constitutions, to construe and apply the law as the legislative power should enact it or change it from time to time; it

had also the distinctive and more important duty of standing as guardian of the constitution, as guardian of the people under the constitution, against encroachment by the executive, as guardian under the constitution, also, of the people and for the people against encroachments by the people themselves through their legislative departments. More than any other feature of our system of government are these functions of the judiciary peculiar and essential. To preserve these functions and to prevent violation of the constitutional limitations by either the executive or the people, to prevent *any* violation of those limitations, indeed, to preserve to our federal government and to the governments of the states their republican form,—the judicial departments were established and were intended to be maintained, not only as separate and independent in form, but as separate and independent in fact. The maintenance of an independent judiciary, then, is essential, not only to the proper protection of every citizen, but to the preservation of our government itself. It was in order the better to establish and maintain this independence of the judges that their tenure of office was fixed, by the federal constitution, during good behavior and by every state constitution either for a lifetime, or a fixed tenure for years, subject to removal only upon charges preferred and a hearing and adjudication before a proper tribunal especially authorized to hear and determine.

The real progressive tendency, the tendency which is consistent only with the spirit and purpose of our form of governments, federal and state, has been to lengthen the tenure of the judicial office, to increase its compensation, and in every way to raise its standard and to safeguard and strengthen the independence of both the position and the person of the judge. It remained for this twentieth century, in the most prosperous and enlightened era of our republic, to witness the serious proposal to inject into our judicial system, both state and federal, the judicial recall by the people, and to witness the establishment, at least in terms, of such a recall in a state constitution.

Since the constitutional amendment of 1908 [Note 1], \*the Recall of Judges is provided in Oregon. It was only a short time ago that an Oregon judge, sitting in the trial of a man charged with murder, who was defending upon the plea of self-defense, instructed the jury that if certain facts had been shown they would constitute in law a justification. The jury found the facts, and followed the instruction of the judge as to the law. The correctness of the instruction is a fairly debatable one. But local prejudice had demanded the conviction of the accused; and on account of his acquittal a cry went up among the voters that the power of recall must be exercised, and a petition was immediately started to get the necessary signatures of 25% of the voters of the judicial district. It matters not what success the petition shall have, the fact of the attempt to exercise the recall power under the circumstances stated, is a demonstration of the tyrannical nature of the power of popular recall and of its possible abuse when applied to the judiciary.

In California and Nevada, constitutional amendments have re-

\*These Notes are to be found at the end of this paper.

cently been proposed by the legislature and are now before the people, containing similar provisions; and a legislative act has just been passed in California which in terms provides for the recall of county judges [Note 2]. In our Minnesota legislature, just adjourned, the "progressive" house passed a bill for constitutional amendment providing for a recall to apply to all judges in the state, but the measure was killed in the senate.

The constitution of the proposed new state of Arizona, now before Congress, has the same provision. Indeed, a bill has been introduced in the United States senate by Senator Owen of Oklahoma, providing for the recall of any judge of the United States Supreme Court, or any federal court, by a resolution of Congress, without a hearing, and for the election of the federal, district and circuit judges by the voters of the district or circuit, with a tenure of office limited to four years. Senator Owen is denominated in politics a "progressive." There is another measure pending in Congress, characteristic of this so-called "progressive" movement, and worthy of many of those who favor the judicial recall, because it strikes at the very foundation of the judicial department and attempts to deprive the judiciary of its most essential function the safeguarding of constitutional rights. In terms, it gives to voters directly the power to enact and to compel the enforcement of statutes, state and federal, which are repugnant to the very constitutional provisions and limitations which were reserved for the protection and safeguarding of personal and property rights. I refer to the bill [Note 3] introduced in Congress by Mr. Berger, the Socialist representative from Wisconsin, providing for pensions to every person in the United States who, having been a citizen sixteen years, is more than sixty years old. The bill contains a provision specifically forbidding the United States Supreme Court from passing upon its constitutionality. However futile, however impossible such legislation, the fact that the voters of any Congressional district like that of Representative Berger, or that the state-wide constituents of any Senator, as in the case of Senator Owen, should select as their representative a person capable of even proposing such legislation, is proof conclusive that, however wisely the judicial recall by the people might be used in some parts of the country, yet its establishment in any particular state would only be brought about by those who would strike down the judicial office and give to the people of the locality in question the power to compel enforcement of legislative acts which are unconstitutional. Its effect in any particular locality where it prevails, is a wiping out of all constitutional limitations, and a return to the tyranny of democracy.

I shall speak directly to the subject of this discussion, which is not the question of the recall in general, nor the question of recall of legislative or administrative officers. Many, and indeed most, of the objections which I shall urge to the judicial recall would apply to all offices; but beyond all the objections which would apply to other offices, the objections against the application of the popular recall to the judicial office are doubly convincing, for they concern the essential function of the judicial office, the very preservation of the judiciary;

they go, indeed, to the question of the very retention of our present republican form of government.

I stand for the proposition that the judicial recall is objectionable upon two general grounds: First, the judicial recall would not only diminish, but it would destroy, the independence of the judiciary, and would eliminate all the essential functions of the judicial department; and is, therefore, unwise and inexpedient; Second, the judicial recall, if applied to federal judges is impracticable, and expressly prohibited by the federal constitution, and its attempted application by states to state judges, even by changes in state constitutions, is repugnant to the federal constitution. But, as a preliminary proposition, let me call your attention to the fact, that the power of the Recall of Judges, if vested in the people, is

#### AN UNQUALIFIEDLY ARBITRARY POWER.

It is assumed by many advocates of this measure that the power of judicial recall by the people is not necessarily an arbitrary one, and that the elements of the proper consideration of cause and even of trial of issues may be preserved. In other words, they assume that it does not involve necessarily an elimination of the protections to the office of judge, and to the independence of any judicial incumbent, which usually exist by virtue of the provisions for impeachment only for cause, after charges preferred and for a hearing and adjudication by a senate or other tribunal authorized for that purpose. They urge that the right of recall may be limited to specified causes, such as malfeasance or improper behavior. Such suggestions are absolutely inconsistent with the very nature of the power given by the popular recall. This is shown; not only by a most cursory consideration of the matter, but by the express terms of the powers which have been arrogated to the people with reference to the judicial recall, wherever that power has been in terms given.

In Oregon the provision is that at any time after six months incumbency the judge may be compelled to go to a vote of the people of his district upon petition signed by twenty-five per cent of his constituent voters, and that upon the ballot the petitioners may state in 200 words the grounds claimed for his removal; and upon the same ballot in not more than 200 words, the judge may answer the charge [Note 4].

It is evident that, even in form and theory, this pretended opportunity to be confronted with charges and to make a defense is a mere farce. It is, in fact, a farce. In the case of the Oregon judge, already mentioned, the Attorney General of that state held that the charges contained in the recall petition, and shown upon the ballot in 200 words, need not be specific; and that it was sufficient if, as in that case, they comprised a mere collection of epithets applied to the judge complained of,—“incompetent,” “unfair,” and the like.

The California provision is substantially the same, except that only twenty per cent of the voters are required upon the recall petition. The Arizona proposed constitution contains the same provision as Oregon, except that the judge attacked has the privilege of resigning



in five days after the recall petition is filed. It is manifestly impossible to provide, in connection with the popular recall, any special tribunal for the adjudication of the issues of either fact or law which must be involved. In any attempt to unseat a judge, the first, the last and the only adjudication is by the people, and that, too, with only the merest pretense of the preferment of charges or of an opportunity to answer. The element of a hearing is entirely absent; there is no adjudication, for no opportunity is afforded to present evidence. All the essential elements of a trial are lacking. The decision is inevitably an arbitrary one made by the people directly, and, so far as such decision is based upon anything, it must be based upon that which is not evidence and must be governed by the hue and cry, by rumor, by misunderstanding and ignorance. The power of judicial recall, when exercised by the people directly at a popular election, can never be anything other than a purely arbitrary power, and accompanied by all the injustice, evils and disasters which inevitably result from unguarded and unrestrained authority.

Keeping in mind that such is the character of the power involved in the judicial recall, it is easily demonstrated that such a measure is (1) unwise and inexpedient; and (2) that it is repugnant to the federal constitution and inconsistent with our republican form of government.

## I.

### IT IS UNWISE AND INEXPEDIENT.

The judicial recall diminishes the independence of the judiciary. It destroys that independence and makes the judiciary absolutely dependent. It strikes at the very foundation of the judicial department of our government. Its effect would be to destroy the judiciary.

It is a strange and significant fact that, while in the past, and particularly during recent years, the Bar generally, and thinking people generally, have been agitating in favor of life appointments for judges, and, where life tenure could not be obtained, then for longer terms, and also in favor of increased salaries,—all for the purpose of strengthening and increasing the dignity and the standard of proficiency and learning of the judicial office and both maintaining and increasing the independence of the judiciary,—we are now suddenly confronted with this phase of an up-to-date epidemic, miscalled “progressivism,” this agitation led by the populists, the socialists, the baiters of industrial enterprises, and all the other mongrel elements of unrest, in favor, not only of the recall generally, but particularly of the recall as applied to the judiciary. We hear it spoken of as a “progressive” measure. My friend, Manahan, who presents here to-day the argument,—if argument it may be called,—in favor of this measure, speaks, he would claim, as a latter-day “progressive.” He dubs his opponents in the argument from Hamilton, Madison and Marshall of a century ago to President Taft and Governor Wilson of New Jersey,—including any of us here who stand for the opposition,—as “reactionaries.”



#### THE "PROGRESSIVE" DEFINED.

But, gentlemen, what is a "progressive"? There are "progressives" and there are "progressives." Some well balanced, independent and far-seeing man, schooled in the principles of constitutional law and learned in the science of political economy, advocates for the consideration of the people, the executives, the legislatures and the courts, some change in the statute law, or even of the constitutional law, to meet the demands of new conditions in our economic and industrial life. He begs for consideration of his proposition, both from the viewpoint of its expediency, and its tendency to facilitate the performance of all the proper functions of the three departments of our government. His measure is consistent with our form of government and with the spirit and terms of our fundamental law. His cause stands for progress in the full and proper sense of the word. He is, in the full and proper sense of the word, a "progressive." There come to his support not alone those whose adherence is gained by a careful consideration of the merits of his proposition, and who, with him, may be rightly called "progressives." But, to a larger extent, seeking change for the sole reason that it savors of an attack upon existing systems, and in proportion to the radicalism or revolutionary character of the proposed change,—there flock immediately to his standard the populists, the socialists, even the anarchists, all the professional agitators, and all the unthinking and unreasoning clamorers for disturbance who cannot shudder at the prospect even of a disruption of our republic. These professional agitators and radicals, disturbers from habit rather than from reason, rush in, out of place and uninvited, under the banner of "progressivism," and pretend to shine through its reflected light. They arrogantly place upon themselves, each with his own hand, the label "progressive", and henceforth complacently claim for any measure, which they, or the most extreme and violent one among them, may advocate, the stamp of "progressive." No matter that they put forth a clamor for confiscation of real property rights by avowedly impartial and unequal taxation; no matter that it be a clamor for the destruction of the liberty of the press, or of the right to hold or control personal property; even if it be for a measure which is so revolutionary that it tends inevitably to the subversion of a republican form of government or to any government and may mean socialism or anarchy:—nevertheless, they arrogate to themselves and to their cause the title "progressive." Though they themselves hold their hands against the integrity and stability of our institutions, and fix their faces turned back to the past in worship of the tyrannies, whether it be of the people or of sovereigns, which have caused the downfall of governments and the despoliation of nations, they assume, under the self-given title of "progressive", to hurl the epithet "reactionary" against all thinking people who, looking forward, oppose their subversive purposes, or who even hesitate and ask time to weigh and consider. Such an one, self-named but mis-named, "progressive," is he who to-day represents the affirmative of this discussion.

We welcome and have respect for those reformers, and there are

many of them, whose advocacy of change is based upon a thorough weighing and consideration of merits and demerits, and who conscientiously and considerately urge modifications of statutes and laws in order to meet new conditions, and whose measures are, or have some pretense of being, constructive in their character. To such I would not deny the propriety of the title, "progressive." They are the very ones to whom the title belongs. But, as a general rule, the so-called "progressive" of to-day is, in heart and in effect, a reactionary, posing under the self-appropriated title of "progressive." All such, and they compose the larger part of the so-called "progressives," are placing themselves before the public under a false label. They ought to be prosecuted under a law against misbranding. The typical, so-called "progressive" of to-day, when searched and analyzed, will very likely be found to be a dynamiter, roaming about in the guise of a policeman, and even wearing an imitation of the policeman's star, which he ostentatiously displays to carry out the pretense that he is a protector of personal property rights. His garb and star are, however, a mere sham to cover his destructive purpose and to conceal the bomb which he carries with murderous intent.

#### THE JUDICIAL RECALL IS NOT PROGRESSIVE.

Mr. Manahan stated upon this floor yesterday that the fundamental principle of our Republican form of government was, that its administration should be in the hands of three separate, distinct and *independent* departments,—the legislative, the executive and the judicial. With such a statement, of course, no lawyer will take issue. But there is no element, especially as applied to the judicial department, which is so of the very essence of its formation and purpose and of its stability and existence, as that of independence. Moreover, it must be an independence not merely as related to the legislative and executive departments, but an independence which must be maintained as between the people upon the one side and the legislature and executive departments upon the other. Yet I have no doubt that the Manahans of Oregon, of California, of Arizona, and the Manahans of Minnesota, as well as those of other states, would, if they could, establish a recall of the federal judges, and would exercise the power of recall upon those judges who recently construed the Sherman Act so as to give to certain of its well-known terms and phrases the very meaning which over a century of adjudication in this country and in England had given to those very terms and phrases. Senator Owen of Oklahoma is just such a "progressive," and represents a state-wide people, a majority of whom are, presumably, the same kind of "progressives."

The one principal function of the judge is to declare invalid and unenforcible such legislative enactments as contravene the express limitations of the Constitutions, federal and state, prohibiting the infringement, by either the executive, the legislature or the people of the personal and property rights guaranteed by the fundamental law. The fundamental law limits even the amendments to these constitutional provisions, and, even where the constitutional amendment

is proper, the method of constitutional change is safe-guarded by provisions preventing all hasty and ill-considered action. The judicial recall not only tends to wipe out all these protective provisions, but must inevitably lead, indirectly but surely, to their abrogation; for the arbitrary power of recall by the voter means that, if the voters shall join temporarily in the demand for the enforcement of a legislative measure which is obnoxious to the principles of constitutional law, and any judge shall hesitate or refuse to violate those principles by declaring the measure valid, he may be arbitrarily recalled and at the same time, in his place, there may be seated a person who, in advance and as a candidate for the express purpose, has consented to ignore all judicial considerations and to grant from the bench the demands of popular clamor. What can be done in the case of one judge, can be done in the case of an entire judiciary. It means, not only possibly, but inevitably, the nullification of constitutional protection through the destruction of the independence of the judiciary. It means an absolutely cringing, vacillating, dependent judicial department. It is no answer to say that where the judicial recall has been adopted, no abuses of the unlimited and arbitrary power given to the voters have occurred, and that we may trust to the body of the voters that they will not exercise the full power given them. We hear much, especially in connection with this subject, of the conservatism of the people, of the great confidence that may be reposed in the ultimate good judgment of any final action which they may take upon this or other important subjects, and that the people are as a rule always right. As well might the framers of our federal constitution have left to the people all power of legislation through Congress, and through the state legislatures, and omitted those vital and fundamental provisions contained in Section 9 of Article I, prohibiting Congress from suspending the privilege of the right of habeas corpus, the passing of bills of attainder and ex post facto laws, the levying of disproportionate direct taxes, and of taxes and duties between the states; or those of Section 10, Article I, prohibiting the states from making treaties, coining money, or passing bills of attainder, *ex post facto laws* or laws impairing the obligations of contracts, or the laying of the imposts on duties, etc.; or the provision of the Amendments Articles I to VIII, prohibiting Congress from interfering with the free and proper exercise of religion, freedom of speech and of the press, and the right to petition,—and against other enumerated safeguards of the person and property, and prohibiting slavery or involuntary servitude in any state or territory; or of Article XIV, prohibiting any state from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of his life, liberty or property without due process of law, or denying any person equal protection of the law; or of Article XV, prohibiting either the United States or any state from denying or abridging the rights of citizens on account of race, color, or previous condition of servitude.

These are some of the limitations that are placed upon the legislative power of the people in the federal constitution, as similar limitations have been placed in all state constitutions, for the very reason

that the judgment and discretion of the people could not be relied upon, especially in times of agitation, and in times of political or economic crisis. The necessary safeguards could be insured only by an express limitations upon the power of the people to legislate, and upon the privilege of the people to have legislation enforced; and, as I have pointed out, the judicial recall is subversive of that very department of government which was established to protect and enforce these safeguarding constitutional limitations.

It is a well-recognized fact that a judiciary with a tenure of office during good behavior is generally more independent and less subservient than one with a tenure for a term. We have examples in our own state of independent, fearless elective members of the bench. However, it is indisputably true that, generally speaking, where the elective system for judges prevails, the independence of the judge often appears to be in the ratio of the length of the time which must intervene before he must again stand for election. It was to prevent this natural and inevitable tendency toward dependence and subserviency on the part of elective judges, that, under our federal system, and that of many of the states, the tenure of office for judges is during good behavior, and they are removable only by impeachment. As was stated in the Massachusetts constitution of 1870:

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and *independent* as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people and of every citizen that the judges of the supreme judicial court should hold their offices as long as they behave themselves well."

Hamilton, in his advocacy of the constitution, explained the object of the good behavior tenure as follows:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this all the reservation of particular rights or privileges would amount to nothing."

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion *dangerous innovations* in the government and serious oppressions of the *minor party* in the community."

"Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial officers in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted

this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution."

The establishment of the judicial recall would take away all the essential functions of the judiciary, for the proper exercise of its functions depends upon the retention of its independence. This is particularly true, as pointed out by Hamilton, under our limited constitution. Our legislatures, national and state, are not parliaments, whose scope of legislation is unlimited by fundamental law. The protection given by our constitutional limitations, is not only to the individual, but to the collections of individuals, whether such individuals in any particular instance control the majority of the voters or are themselves the minority.

One of the chief functions of our courts is to stand between the legislature, although that body may for a time represent the majority of the people, and the individual or individuals who may for the time comprise the minority, and to prevent an infringement by the majority, through the legislature representing them temporarily, of the rights guaranteed to the individual, or it may be to an entire minority. But the proposition of the judicial recall entirely ignores this fundamental principle. It establishes the rule substantially that the majority of voters shall have the privilege and power of immediately withdrawing from the bench any judge or judges whose decrees tend to thwart their purpose or desire, and to place upon the bench in their stead other judges who may be not only acquiescent in, but are actually committed in advance to their demands. Such demands may well be, and in many instances probably would be, demands for adjudications which ignore and set aside constitutional guaranties. Thus the destruction of the independence of the judiciary would destroy every function of the judicial department. The judicial recall, therefore, when analyzed to its logical conclusion, brings us to what is practically the power, not only of legislation but of judicial adjudication, placed directly with the majority of the voters, and, therefore, to a usurpation and the destruction of the functions of the judiciary. As well as to have the judicial recall, we might abolish the judicial department entirely, and expressly leave the decision of legal and constitutional questions to the arbitrary control of the people to be expressed from time to time by popular vote.

The proposition of the judicial recall would violate another vital and fundamental rule which is the basic element of everything judicial. It is an arbitrary power, against a person in office, exercised against the object of its attack without allowing to him the privilege of being confronted with charges or the privilege of a hearing. I have already shown the futility of any attempt to make the power of judicial recall any other than a purely arbitrary one. It involves not only the abolishment of the form which at the present time is provided for impeachment after charges preferred, and for trial and adjudication before a proper tribunal, but it necessarily involves the abolishment of the very substance, idea and spirit of such provisions.

The judicial recall is in conflict with every fundamental principle of our government. The basic purposes and object of the judiciary are that the members of the court pass judgment only after issue is joined, with a hearing upon the facts, and then only upon and consistently with the elementary principles of personal and property rights expressly guaranteed by the fundamental law; and, further, that no member of the judicial tribunal should be influenced in any degree by outside considerations, whether in advance of, or during, or after the hearing; and that, without prejudice, and uninfluenced by any ulterior considerations, as to past, present or future, he should, in his conclusions of law, apply the law to the facts, with due regard to the constitutional guaranties, and without fear or favor or any predetermination as to the result, and that his final adjudication should be an order or decree, logically and consistently following from the facts and the conclusions of law impartially found. The judicial recall, as thus far attempted to be applied in this country, means that a judge may be immune from unwarranted attacks upon his integrity for the first six months of his incumbency, but that at the expiration of that period he shall be accountable for all his official acts, not to his conscience, not to a tribunal who shall adjudicate after a hearing, but to that portion of the voters who for the time being may constitute the voting majority, and who may momentarily be induced, arbitrarily and without a hearing, to express a choice that he be called from the bench, in order, perhaps, that a precommitted substitute may be placed in his stead. Thus the judicial recall not only destroys the independence of the judiciary, but in fact it destroys entirely the judiciary itself.

There are further objections based upon the ground of policy. It discourages lawyers possessing high attainments or a deep sense of professional ethics, from accepting positions upon the Bench. It tends to lower and must necessarily lower the judicial standard. No lawyer qualified for a judge would allow himself to be put into the position where as judge he must either decide a case contrary to his conscience, or suffer the disgrace of a recall. No man worthy of a judgeship would be willing to be tried and convicted by public clamor without an opportunity to be heard.

Moreover, the judicial recall cannot tend to eliminate corruption in the judicial office, but rather would tend to increase it. It is not a cure for corruption. The judge who is recalled for actual corruption will always, so far as the public records are concerned, remain upon a par with the one who is recalled because of a correct decision which happens at the time to be unpleasant to the multitude. The protection of a hearing upon charges preferred, is not vouchsafed to either.

Neither will it prevent or diminish the so-called corporate control of the judiciary. The liability of the intervention of outside influences is greater as the term of the judicial office is diminished. If, in any locality, corporate interference in politics is practiced, the judicial recall would only facilitate the tendency and power of corporate control. It would not, in many judicial districts, take great management nor much expenditure to obtain the signatures of 20 or 25% of the voters, and to keep up a hue and cry so that at the polls the very indictment



which has been made by the mere filing of the recall petition should be taken by a majority of the voters as sufficient proof that, at least, there ought to be a change.

Again, the recall of judges deprives them of that protection in the performance of their official duties which is necessary to the preservation of their independence and which is essential to their judicial function. The judiciary cannot protect constitutional rights when the judiciary itself is not protected under the constitution.

It is said that the recall will bring and keep the judicial office and the judge nearer to the people. This is true only in a sense that it tends to compel the judge to keep constantly dependent upon the changing whims of the people and to compel him at any and all times to follow, under threat of recall, any demand which the majority may be willing to make that the constitutional barriers between valid and invalid legislation be broken down. It tends to pull him down from his high office and make him a mere servant, even a spokesman, of the majority, for the time being, of the voters of his district. Under such a system, public respect for the judge, which is one of the most important essentials of his office, is destroyed. He sits subject to the popular recall, at all times menaced with the threat that his ruling and judgments, however conscientious, however correct, may at any time, if he happen to meet the disfavor of the community, bring upon him the disgrace of a sudden and arbitrary retirement:

The attempted answer has been put forth, that if judges are recalled unjustly, history will vindicate them. No better answer could be made to this, than that made by Representative Hamilton of Michigan, the other day, in discussing the Arizona matter in Congress, when he said: "A good many monuments have been erected to martyrs out of the stones wherewith they were stoned. But what do dead men care for monuments?"

The judicial recall is, therefore, unwise and inexpedient. It takes away every essential feature of the judicial office. It destroys its independence. It prevents entirely the exercise of the judicial function of maintaining and enforcing the constitutional protection guaranteed to every individual in his person and property. It makes him the mere servant or spokesman of a temporary majority. It opens the way for arbitrary disregard and practical annulment of constitutional provisions without amendments in the proper and prescribed manner. It does away with the judicial department of the government of any state or locality in which it is or may be exercised.

But a further, and even more vital objection is that it is inconsistent with and repugnant to the fundamental law of this land, and inconsistent with our form of government; and to these last named objections I wish to call your attention further.

## II.

### IT IS UNCONSTITUTIONAL.

I have already shown that the proposed judicial recall by the voters can only mean an arbitrary power of recall, to be exercised by the

people directly without charges preferred, without a hearing, without an adjudication. We have seen how the absence of the provisions for a proper tribunal before which upon charges preferred a hearing may be had and an adjudication made, subjects us to the evils of tyranny, and this, too, whether the arbitrary power of recall rests directly with the sovereign or with the people. It was to avoid the evils of such tyrannical power upon the part of a sovereign that the Act of Settlement was evolved in England during the reigns of William III and George III, and secured to the judges their tenure of office during good behavior, subject only to impeachment by Parliament. In so much did the Act of Settlement make the government of England take on a feature republican in form, for the power of removal of judges was given to the representatives of the people,—not, mark you, to the people themselves directly, but to the representatives of the people, the Parliament, which was given the duty to hear and try and determine, and which was a body so constituted that it could perform that function. The judicial recall provides, as found in the Oregon and Arizona constitutions, rather a return to the ancient arbitrary power of the Demos, as in Athens of the time of Aristides. It is a re-establishment of the tyranny of democracy. It disregards the fundamental principle of a republican form of government, which is, upon the one hand, to protect the people from the tyranny of a sovereign or executive, and, upon the other hand, to protect the people,—that is, the individual or other minority of the people,—against the tyranny of the majority. It is a principle which is generally essential to any republican form of government that the people in whom, in one sense, the ultimate power resides, shall speak only through their representatives duly selected for that purpose. It is absolutely essential to the maintenance of a republican form of government that there should be maintained a separate and independent judicial department, and that the independence of the judiciary should be maintained not only as against the executive and legislative departments upon the one hand, but as against the people, or a majority of the people upon the other. The judicial recall, as we have seen, not only takes away the representative element, but so destroys the independence of the judiciary that it practically eliminates the judicial department from the system of government.

The federal constitution provides (Art. IV, Sec. 4):

“The United States shall guarantee to every state in this Union a republican form of government.”

This means, as pointed out by Madison in the *Federalist*, the republican form of government which existed generally among the various states at the time of the formation of the constitution. He says:

“But who can say what experiments may be produced by the *caprice* of particular States, by the ambition of enterprising leaders, or by the intrigue and influence of foreign powers?”

“As long, therefore, as the existing republican forms are continued by the States they are guaranteed by the Federal Constitution.”

“The only restriction imposed on them is this, that they shall not



exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

It is true this constitutional provision does not mean the retention of any one particular republican form of government as against any other; but the retention of the independence of the judiciary is such an essential element of a republican form of government that, when it is destroyed, the government ceases to be republican in form. This is shown by a study of the history of the formation of our federal constitution, in the framing of which the chief object sought to be accomplished was to avoid the follies and evils arising from a tyranny of the people,—that is, the tyranny of any temporary majority,—even more than it was to avoid the evils of monarchical tyranny. As was stated by Mr. Madison:

"From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will in almost every case be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property, and have in general been as short in their lives as they have been violent in their deaths."

"A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it differs from the pure democracy and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union."

"The two great points of difference between a democracy and a republic are: first, the delegation of the government in the latter to a small number of citizens elected by the rest. . . ."

"The effect of the first difference is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to *temporary* or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the *people* themselves convened for the purpose."

My friend upon the other side urges that the judicial recall is, in truth and in fact, a progressive measure, indeed constructive in its nature; for, as he says, in this government, which is of the people, by the people, and for the people, it brings us closer to the people and makes of our government more nearly a pure democracy, and that no citizen should oppose anything which would tend to make this democratic government more purely a "democracy." Was such the opinion of the framers of our federal constitution? This government was never, and was never intended to be, a pure democracy, any more than it is, or was intended to be, a monarchy. It was to avoid the follies and evils of a pure democracy, such as ancient Athens, the entangle-

ments, turbulence and impotence of a too democratic form of government, even more than the evils and dangers of a monarchical form, that our government was established under its present form, a form neither monarchical nor democratic, but with a system which would properly balance between the two, and having features which neither of the others have,—liberty under the law, protection, under the law, of person and property, and stability so that its protective features might remain permanent. It is a republican form of government which could only be maintained by the preservation of its three great departments, and by the preservation to each department of its essential functions. It is futile to attempt to introduce any proposed radical change, like that of the judicial recall, on the ground that it is more consistent with a system of "democracy." A republican form of government cannot be a democracy, any more than it can be a monarchy or a despotism. Among the essential elements of a republican form of government is that of speaking or acting through representatives, that such representatives shall be secure in their term of office, removable only for cause and after a hearing. It is only by such methods that the very objects of our republican form of government can be accomplished,—by placing the power to act in governmental affairs in the hands of those who, for a time, shall be able to study and hear both sides of any issue, and who shall be influenced, not by clamor, but by carefully formulated judgment. Then there is this other element, which, while desirable in administrative offices, is absolutely essential in the case of the judiciary, for its absence means the destruction of the judiciary itself. I refer to the independence of the judiciary, which, I have shown, is destroyed by the judicial recall, and with it the judiciary itself. The judicial recall would eliminate, for all practical purpose, the most important of the three branches or departments, the maintenance of which is essential to our republican form of government. Its adoption, therefore, by any state is repugnant to our federal constitution. The federal constitution, by its provisions, established and provided for the perpetual maintenance of a federal system of government, republican in form. All constitutions of the states originally adopting the constitution were republican in form and contained, as essential features, all the protective measures, which, as we have seen, the judicial recall would nullify. No constitution of any state has been approved by the Congress or federal courts, which has contained a provision for the recall of judges. But the federal constitution intended not only that the system of federal government should be kept republican in form, but to prohibit the introduction into any system of state government any feature which should be un-republican. It was not left to the discretion, the wisdom, or the unwisdom of the citizens of any state, to make any changes, which should be un-republican, in their form of government, and this, too, whether it be by constitutional amendment or otherwise.

#### THE ARIZONA QUESTION.

This question is now before Congress in connection with the admission of the state of Arizona, with its proposed constitution provid-

ing for the judicial recall. It is apparent that the acceptance by Congress of this constitution would not be an adjudication of the constitutionality of the recall provisions, for that can only be determined by the Federal Supreme Court, when it shall perform, as to this issue of law, its constitutional duty of declaring whether or not such provision contravenes the provisions and guaranties of the federal constitution. However, it is clear that Congress should not accept that constitution. It should refuse to accept the constitution proposed by Arizona without an amendment eliminating the recall of judges, on the ground that it is repugnant to the federal constitution. That the absence as yet of any adjudication by the federal court upon this question may leave it involved in some doubt, is not sufficient reason for refusing to reject the recall measure. The rule and precedent are well established that Congress may, upon the proposal of admission by a state, insist upon proper amendments to its constitution as a condition precedent for admission, where such amendments are deemed by Congress necessary or proper to make the constitution consistent with the fundamental law or where such amendment, independent of constitutional grounds, is deemed by Congress to be desirable and expedient. On this proposition, it seems to me that ex-President Roosevelt is wrong in his position urging the unconditional acceptance by Congress of the Arizona constitution. In his recent editorials in *The Outlook* [Note 5] he ignores or overlooks entirely the constitutional objections which are involved, and assumes, apparently, that it is within the power of any state to put a judicial recall provision into its constitution and to enforce it. This is his first mistake. He is also wrong in assuming that, construed as a mere question of expediency and judgment, it is a matter which must be left to the Arizona voters; for the question of the expediency and propriety of the provisions of the constitutions of states proposed for admission has always been held to be a matter and an essential matter of consideration and determination by Congress.

The attitude of the Arizona voters is unique and, it is unnecessary to say, untenable. Their attitude is shown through their spokesman, Mr. O'Neill, before the Congressional committee, when he stated that Congress should not and could not change any line of the proposed constitution, except with the assent of the people of Arizona. "We will not," he says, "surrender a principle or yield for a moment the right to Congress or anybody, to tell us what we have got to do in order to come into the Union of the States. That is our position." [Note 6.] Mr. O'Neill evidently would assert for the people of Arizona the power to establish by their Constitution an hereditary governorship, and thereby to establish a local monarchy, and would claim that, despite such choice of the Arizona people, if made, Congress, without any effectual protest and without changing any principle or line of such proposed monarchical constitution, would be *compelled* to admit such new government, a state only in name, "into the Union of the States."

Referring to the Arizona recall provision, and particularly, to the privilege given the judge against whom 25 per cent of the voters have filed a recall petition, to resign in five days, and present his defense

against any charges in a statement limited to 200 words, Representative McCall of Massachusetts, said the other day in Congress. [Note 7.]

"What sort of a judge would you have under that system—a judge who would feel that after any decision, if he might offend some powerful interests, if he might offend some great politician, if he might offend some great corporation employing thousands of men, or some great labor union which might hold the balance of power, he would be subject to recall? What sort of justice would you have under such a system? Why, your judge, instead of going to the sources of the law and to the fountains of jurisprudence before deciding a case, would go out and look at the weathervane. He might be put on trial before the very mob from whose lawless vengeance he had just rescued a prisoner."

It is claimed that the question of the constitutionality of the recall has already been adjudicated and the recall sustained. As applied to administrative officers, some state courts have in some instances upheld it, and in others declared it unconstitutional. The constitutionality of the judicial recall has never been adjudicated; and both as to administrative and as to judicial offices, the question is yet to be determined by the Federal Supreme Court. In Massachusetts, in 1908, in the case of a non-judicial municipal office has been created, and its tenure fixed, with the recall provision, by the charter of a city, the recall provision was held not contrary to the state constitution, because it was an office not established nor contemplated by the state constitution. No federal question was discussed or decided. [Note 8].

It has been held in Oregon, and elsewhere, that a provision for initiative and referendum in the state constitution, does not conflict with the provision of the federal constitution guaranteeing to every state a republican form of government. But this was expressly upon the ground that the representative character of the legislature and the essential functions of the legislative department were not thereby destroyed, as the legislature still retained the power of repeal and amendment, and all statutes were still subject to construction and enforcement under judicial supervision, and the power of the courts to nullify legislation or a provision of a state constitution, if repugnant to the federal constitution, still remained. [Note 9].

From what has been shown as to the effect of the judicial recall, the reasoning of the Oregon Supreme Court in the referendum case referred to is not only not authority in favor of a judicial recall provision, but is against it.

In a Washington case, in 1909, the provision for recall of a municipal officer, not judicial, contained in a city charter, was held not repugnant to the state constitution. No federal question was considered. [Note 10.] In Texas, in March, 1911, the Court of Criminal Appeals held that the initiative and referendum provision in the city charter of Dallas was repugnant to the provision of the state constitution prohibiting any change destructive of a republican form of government, and making the legislature a distinctive part of the government. [Note 11.] The court said:

"These exceptions manifest the correctness, certainty, and exactness of the general rule that the laws must be enacted by the Legis-

lature. This doctrine also flows from the very framework of our form of government. It is the basic principle and theory of republican form of government as set out in the Constitution; and right here it may be observed that there is a wide distinction to be noted between the "right of petition and remonstrance," provided for in the Bill of Rights, and the referring to a vote of the people the enactment of laws. Ours is a government of division and distribution of powers and authority. Ours is also a representative democracy; that is, it is republican in form of government as contradistinguished from a social or pure democracy on one hand, and a government by the minority on the other, and excludes all others save and except one by the people through their selected representatives. The transfer of the enactment of laws to the people to be made operative by their votes is therefore directly subversive of our constitutional form of government, and can only be upheld when expressly authorized by some provision to be found in the Constitution itself.

The referendum not only sets at defiance these constitutional guaranties, but it as well destroys the purpose and authority of the legislative department; or, on the other hand, may make that body omnipotent and superior to the Constitution from which its authority is derived. It would reinvest the people with the functions of legislation conferred upon that department of government. It is also a direct attack upon the judicial system provided by the Constitution. The courts were ordained for the purpose of the trial of causes awarding to the citizenship tribunals in which their matters may be tried and adjusted. Referendum refuses a hearing. It takes the place of the constituted judiciary, and tries the rights of property through the ballot box. By this means every officer in the state from Governor to constable may be ousted from office and declared incompetent or corrupt, without charges, evidence, or trial. The property of the citizen may be confiscated, and he made a bankrupt without a hearing and without due process of law. Successful revolt from a monarchical form of government eliminated the idea of minority rule, and the provisions of the constitutional form of government discarded the idea of a pure democracy and rejected it as vicious. These matters were all discussed at the inception of the government and fully decided. The referendum, therefore, is wrong, first, as being directly subversive of the principles of republican government; second, violative of the Constitution itself, and not to be entertained, unless expressly provided in the Constitution, and, third, its most insidious and far-reaching danger may be found in the fact that it is made to begin at the bottom of our framework of government in the small divisions, and thence will undermine the entire fabric."

Here, again, the federal question was not directly discussed. The constitutional provisions which were held prohibitive, were state, and not federal. However much or little we may agree with the application in these decisions of the constitutional restrictions as invoked against the referendum, the reasoning and conclusion, when applied to a recall of judges, are most convincing. The destructive effects of a judicial recall upon the entire judicial department, and, therefore, upon the republican form of government which is guaranteed by the federal constitution, are so certain and so direct, that the judicial recall is immeasurably more obnoxious and more repugnant to constitutional restrictions, than could be the interjection of the referendum into the legislative department, or the recall of merely administrative officers. The significance and importance of this decision of the Texas Criminal Court of Appeal are, therefore, not lost, but rather enforced,

by two Texas decisions which were handed down a month later. [Note 13.]

On May 30, 1911, the Texas Civil Court of Appeals upheld the recall provision in the same Dallas city charter, as applied to an administrative officer, the city superintendent of schools, and on June 23rd the Texas Supreme Court affirmed that decision by a majority opinion which held that there was nothing in either the state constitution or the federal constitution which prohibited the enforcement of such a measure. That decision cannot stand as an authority or precedent. Under the circumstances surrounding it, it is discredited by its very rendition. The Texas state constitution is as prohibitive as our Minnesota constitution of the institution of either the initiative, referendum or recall; and yet the announcement of the proposition that the legislature of this state could establish either the initiative, referendum or recall, even for administrative offices, without an amendment to the state constitution, would bring a laugh of scorn from all of you, be you progressives or reactionaries. There are certain significant circumstances connected with the rendering of this majority opinion in this last Texas case. The appeal was perfected, argued, submitted and decided in 23 days after the decision of the lower court, during which time the Arizona question was being most hotly discussed in Congress. The Texas decision appears more like a piece of special pleading, intended to be injected into the Congressional debate. It is safe to say that when the minority of the Supreme Court file the statement of the grounds for their dissent, as they announce they will, the reasons will be placed clearly on record why this latest decision upon this subject is a forced and unfounded one and why, applying only to administrative offices, it cannot stand as an authority, either in terms or by analogy, for the validity of any constitutional or legislative provision for the recall of judges.

#### RECALL OF JUDICIAL AND OTHER OFFICERS COMPARED.

There is a manifest distinction, in principle and in effect, between a recall of officers who are purely administrative and those whose functions are judicial. A candidate for a legislative office goes before the people upon the platforms and on promises as to what particular measures, policies and laws he will favor or oppose. He does, and may, commit himself in advance to those from whom he seeks election, as to the judgment which he shall pass as to any particular measure or issue which is to come before him, and as to the specific action which he shall take. Indeed, he does and may agree to yield to the demand of the electors upon questions as to which his own best judgment differs with that of the electors. He may and does become the mere spokesman in the legislature, of the wishes and demands of a temporary majority. It is not, comparatively speaking, without some show of reason that justification is claimed for a recall in the case of a purely legislative or administrative officer. But when the same principle is attempted to be applied to the judicial office, the element of justification is entirely lacking. The very nature of the judicial office



forbids that a candidate for judge should commit himself in advance upon any question which is likely to come before him in his official capacity, as to how he will construe a constitution or statute, or whether or not he will enforce by his decrees any certain legislative enactment.

It is not consistent with the office of judge, but is inconsistent with it, that he shall represent or promise to represent either one faction or the other in any contraverted issue involving the interpretation of a statute, or involving its enforcement as against constitutional prohibitions or limitations. But the judicial recall eliminates all elements of judicial consideration, and makes of a judge a mere puppet, powerless to perform his duty, and compelled, it may be, under threat of the recall to violate the duties of his office. For example, a judge decides a case as to which, without understanding the law or the facts, there is a great unanimity of feeling in the general public as to what the decision should be. He decides it upon the facts presented to him in legal form by proper evidence, and applying the law conscientiously, renders a decision which meets with disfavor. A petition for his recall is filed. The issue at the recall election is the decision in question. In 200 words he is given the privilege of justifying himself in a matter which involves the careful consideration and weighing of important and perhaps most intricate questions of constitutional and common law. He is allowed a defense which makes the entire proceeding a farce. He fails of re-election, and his successor, committed in advancement and announcing his decision in advance, takes his place. In the meantime, the Supreme Court affirms the decision of the recalled judge on all essential law points, but for special reasons it happens that a new trial must be had. The new trial comes before the newly-elected judge who must now decide directly against the law as declared by the highest court of the state, or, by a decision which is inconsistent with the promises, express and implied, made before his election, subject himself to a recall. Such is only one of the many abuses which would be brought about by the judicial recall, and which would make the administration of justice a travesty.

It not infrequently occurs,—(for example, you will never forget the attempted "seven-senator" bill of the last Minnesota legislature, limiting the representation of senatorial districts regardless of population)—where the majority or the representatives of the majority of the people of the entire state force the passage of a law which is unpopular with the people of some judicial districts. In such a case, a judge in one district may be driven to the alternative of construing a statute against his conscience and judgment of the law, in order to meet the local demand, or submitting to a recall. No such embarrassments or inconsistencies are brought about by the recall of administrative or legislative officers.

Judges, though chosen by a majority, cease, when once in office, to be the servants of the people. The right of domination in the case of judges is not properly with those who happen to have in the first instance the right of selection. After induction into office, the judge becomes the protector and adjudicator for the whole people. He is not the judge, much less the servant, for the majority against the

minority of voters. He represents the minority, as well. He represents the weakest class, the humblest individual, just as much as, and even more than, he represents the dominant political party or any majority of voters, whether they be under the influence, for the time being, of the laboring or of the monied classes. During his term of office he must be answerable to no one for his decrees and judgments, honestly rendered,—answerable to no one, except, using the words of Chief Justice Marshall, to his conscience and to his God. Speaking of the office of judge, Marshall said:

"Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting—between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the performance of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depend upon that fairness? The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely *independent* with nothing to control him but God and his conscience? . . . I acknowledge that in my judgment the whole good which may grow out of this convention, be it what it may, will never compensate for the evil of changing the judicial tenure of office. . . . I have always thought from my earliest youth till now that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a *dependent* judiciary."

The judicial recall is, in fact, a reactionary measure, proposed and urged not by either of the two great political parties, nor by those conscientious reformers who, independent of the two parties, are working wisely for reform and progress. It is a reactionary measure attempted to be forced upon the people of this country by those progressives who are misguided and misnamed. For those who deride as "reactionary" the views of the Constitution framers, Hamilton and Madison, and the views of the real Constitution maker, Marshall, who by his decisions, gave to our Constitution, and at the same time to our system of government, stability and permanence, I would like to call attention to the opinion of an up-to-date, ideal progressive, as to the judicial recall,—the historian, educator and statesman, the representative leader of the Democratic party to-day, Governor Woodrow Wilson of New Jersey, who says:

"The recall of judges is another matter. Judges are not lawmakers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom is of the first consequence to the stability of the state. To apply to them the principle of the recall is to set up the idea that the determinations of what the law is must respond to popular impulse and to popular judgment. It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence by threat of recall those who merely interpret the law already established."



Next, from another true progressive, the leader and successful standard-bearer of the Republicans, who, in the performance of the duties of his present high office, has always retained and never failed to display at every crisis, vigorously but judicially, the staunch, sturdy, fearless independence of the judge. Speaking of the judicial recall, President Taft, the other day, before the Conference on Reform in Criminal Law, held in New York, spoke as follows [Note 14]:

"Not content with reducing the position of the judge to one something like that of the moderator in a religious assembly or the presiding officer of a political convention, the judge is to be made still less important and to be put still more on trial and to assume still more the character of a defendant. If his rulings and conduct in court do not suit a small percentage of the electors of his district, he may be compelled to submit the question of his continuance on the bench during the term for which he was elected to an election for recall, in which the reason for his recall is to be included in 200 words and his defense thereto to be equally brief."

"It can hardly be said, my friends, that this proposed change, if adopted, will give him greater authority or power for usefulness or constitute a reform in the enforcement of the criminal law of this country. Let us hope that the strong sense of humor of the American people, which has so often saved them from the dangers of demagoguery, will not be lacking in respect to this 'nostrum.'"

The judicial recall is obnoxious on the grounds of reason, wisdom and expediency. More than that, we may expect that, whenever the question shall be properly presented to the highest court in the land, it will be held that such a measure is unenforcible in any state or in any judicial district as being repugnant to our Federal Constitution and to our Republican form of government. (Applause.)

#### NOTES.

1. Sec. 18, Art. II of the Oregon Constitution, adopted 1908.
2. Chap. 842, California Laws 1911.
3. This Bill of Rep. Berger was introduced in the House July 31, 1911. In revising this argument for printing, I take the liberty of adding this subsequent incident for the purpose of further illustration.
4. Law Notes, August 1911, page 81.
5. The Outlook for June 24, 1911, page 378.
6. Congressional Record for May 22, page 1439.
7. The Independent, June 1, 1911, page 1135.
8. Graham vs. Roberts, 200 Mass. 152; 85 N. E. 1009.
9. Kadderly vs. Portland, 44 Oregon, 118.
10. Hilzinger vs. Gillman, 56 Wash., 228.
11. Ex parte Farnsworth, 135 S. W. 535, 537-8.
12. Bonner vs. Belsterling, Decided May 30, 1911, Court of Civil Appeals, 137 S. W., 1154; affirmed Sup. Ct. June 23, 1911, 138 S. W. 571.
13. For further references on this question, I would cite the following: Congressional debates in House, April to July, 1911, on admission of Arizona, and particularly the numbers for May 18, 22, 23 and June 23; Deploige, "The Referendum in Switzerland;" Fink, "The Recall of Judges," North American Review for May, 1911; The Arena for July, 1906; Wisconsin Library Commission Bulletin No. 12, issued December, 1907—"The Recall," by Schaeffner; see also "The Recall Amendment" discussions in Transactions of the Commonwealth Club of California, Vol. VI, No. 3, published San Francisco, July, 1911.
14. Since the above was in type President Taft (on Aug. 15) in his veto message on the Arizona Resolution has stated more fully his objections to the Judicial Recall.





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**THE JUDICIAL RECALL—A FALLACY REPUGNANT TO  
CONSTITUTIONAL GOVERNMENT**

**BY**  
**ROME G. BROWN,**  
**Attorney-at-Law, Minneapolis, Minn.**

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BY ROME G. BROWN,  
Attorney-at-Law, Minneapolis, Minn.

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## *Fallacious Methods of Advocacy*

The other evening, on a city street corner, I was attracted by a hue and cry and by discordant notes emanating from a badly played violin in the hands of an up-to-date street fakir around whom, drawn by the smoky glare reflected by an improvised torch and by the din of voice and fiddle, were gathering the passersby to listen to the "lecture," guaranteed free to everybody and to be followed by a most extraordinary "offer" for the benefit of all mankind. In high sounding phrases, smacking of all the medical learning from Æsculapius down to date, but with quotations from standard authorities garbled and distorted into perverted meanings, and with now and then a homely but subtle and insidious *ad hominem* appeal, the fakir detailed most of the physical ills with which the human body is afflicted and alleged symptoms of this and that disease; and, having scared his hearers into a receptive mood, he launched forth with, as it seemed to their excited minds, bursts of eloquent and impassioned oratory. He represented the average human being as an object of piteous decrepitude or as the hopeless subject of degenerating tissues and death dealing germs. His entire argument was a mass of unscientific exaggeration of known evils and of worse ones purely imaginary. He inveighed against all the medical learning of the day and against the expert knowledge and experience of those recognized as authority in the science of hygiene, medicine and surgery. All learning and experience as shown from history were nothing. The wisdom of the fathers was merely tradition founded in error. What they had wrought out and handed down, the greatest discoveries and developments of the science of safeguarding human life and health which had brought the human race to the highest standard of scientific warfare with disease, were mere mockeries to the real truth. All of which,

and more, was easily proved by the fact that the present systems of treatment were unavailing to eradicate disease, that men still continued to die and to suffer from ills which brought, and at all times threatened, incapacity and death. Having thus demonstrated his major premise, and at the same time all the other assumed elements of his syllogism, he reaches down and brings forth a little sealed box marked "The People's Own Cure—a Progressive Remedy;" and asserts his assumed conclusion that this remedy, by its virtues, as demonstrated by its label, is the final and only true solution of the problems of human illness. Incredulous as I had been, I seemed to become changed from merely a curious listener to a submissive patient. Temporarily, through a sort of mental indolence, the high-sounding, oft-repeated periods of the phrase maker had seemed almost to benumb my reason and to send me hopelessly groping after new means of self-protection, for which I was accustomed, in my saner moments, to rely upon a fund of knowledge slowly accumulated by careful study and experience. Healthy as I supposed I was beyond the average man of my age, I felt, for the first time, unusual dimness of vision, a weakness in my back, defects in my breathing, a numbness in my feet and limbs and a new sensation of heart palpitation. How had that fool of a life insurance medical examiner recently passed me as sound? I had now a chance at least to make good; and it was only shortly before I came to myself that I, too, was reaching into my pocket to join the crowd in buying and partaking of this alluring "cure-all," thus suddenly and adroitly flashed upon them, without analysis and without any assurance of its nature or effects, except as conveyed by its seductive label.

Not for the purpose merely of indulging in a figure of speech, not merely to reduce an answering argument to terms of ridicule, much less to exploit my sense of humor—on the contrary, as a carefully deliberated illustration of the methods commonly employed in advocating the measures of the Judicial Recall—I offer this example of the up-to-date nostrum vendor. Like the advocates of those measures, he defies the experience of all history, he carps at all established institutions, pictures all progress as a delusion of stilted ignorance and brands as "reactionary" all those who hesitate or refuse to attach themselves to his newly discovered panacea, brought now for the first time in modern history to public attention under the enticing title of a "progressive" remedy. No real diagnosis, no scientific study

or consideration of the nature of the functions of the system to which it is to be applied, no scientific study of remedial agencies, no test or examination of the medicine, whether it be a compound or a single element, no deliberate consideration of the necessary or possible effects of its application—only a cry of pain and a jump in the dark—these are the characteristics of the methods employed by exhorters for the Judicial Recall in presenting their vicious but seductive fallacy, a fallacy which is repugnant to constitutional government.

An examination of the considerations which have been urged for the Judicial Recall, whether it be the Recall of Judges or of Judicial Decisions, and whether made by an ex-President or by United States senators, arrogating to their peculiar views the exclusive right to the title of "progressive," shows, without exception, the adoption of the street vendor's methods. They all dwell upon and exaggerate the existence of error, injustice, imperfections in the administration of justice or in the personnel of the judiciary, breathe distrust for existing conditions and disrespect for present institutions and incite discontent among all the restless elements of the unthinking and the untaught; and thereby confront large masses of the people with their first lessons in constitutional government, administered in the form of demagogic tirades poured forth not only against our federal and state constitutions but against any form of constitutional government. At the very time of the greatest sensitiveness of public feeling, at a period most critical, because of the unsettled condition of public opinion on great political, economic and social questions, these pretending teachers of the multitude, who, as citizens and as office holders in various capacities, have sworn to support the government of the United States and its constitution, are insidiously filching from the minds of those taught in the principles of constitutional government and traducing to those yet untaught, the fundamental and vital principles and axioms which are the very basis of our republican form of government. They distort precedent, misquote authority and misrepresent the purposes for which our government was framed. They replace justifiable feelings of contentment and prosperity with discontent and conviction of prevalent social and industrial injustice. They even extend their exaggeration of unnecessary evils to the highest fountain of justice that has ever existed under any human form of government, to that court which, under our constitution, stands as the final protection against injustice, as to which court the



humblest citizen of the land may feel that, as stated by our former minister to England, Edward J. Phelps,

If oppression and wrong should gain the ascendancy, and injustice stalk abroad in the land, and all else fail him; nevertheless his humblest roof, and all things that are sheltered beneath it, would find, somehow, someway, a final refuge and protection in the Supreme Court of the United States.

It is this court which Rufus Choate, in his speech before the Constitutional Convention in Massachusetts in 1853, presented to those who were crying for unrestrained and unlimited power of the people as the final bulwark of law and justice, guaranteed by our constitution to every citizen—a court, as he said,

Appropriated to justice, to security, to reason, to restraint; where there is no respect of persons; where will is nothing and power is nothing and numbers are nothing, and all are equal and all secure before the law.

Without admitting the evils enumerated and assumed by the advocates of the Judicial Recall as a justification and final argument for their proposition, I would begin where they leave off. I would assume, for the purpose of argument, the existence of many of the evils which they relate. I would remind them that the best elements of the national and state bars are seriously and energetically working for practical reforms in legal procedure, in the manner of the selection of judges, and in the prevention of delays and against the miscarriage of justice, and this, too, by feasible and constitutional measures and by every constructive and really progressive method which can be devised; and that the fact that satisfactory remedies have not yet been attained, is not the fault of the bench or of the bar, whose leaders have for years been urging upon the people, through the legislatures, fully formulated and efficient remedial measures. The fault lies with the people themselves, whose direct representatives in the legislatures, national and state, refuse properly to consider and act upon proposed laws of authenticated and undeniable efficacy. The failure or absence of remedy in no degree constitutes a justification for the application of the drastic and suicidal measures involved in the Judicial Recall.

Contrary to the methods of the Recall advocate, let us bring ourselves back, first, to a consideration of the nature and functions of the system to which this untried specific has been prescribed. Then let us examine the real character of the proposed remedy itself.

By no other method can its desirability or its efficacy be determined. By no such method has it ever been presented by its advocates. It will appear that the proposition of the Judicial Recall, whether in the form of the Recall of Judges or of Judicial Decisions, is not one of remedy for existing evils, but is an attack upon constitutional government itself; for it strikes at the very keystone upon the stability of which depends our present form, or any form, of constitutional government.

### THE NATURE AND FUNCTIONS OF OUR CONSTITUTIONAL GOVERNMENT

To discuss comprehensively the questions involved would be to repeat and enlarge upon great constitutional authorities who have presented, in general and in detail, the growth, nature and extent of constitutional functions including those of the judiciary. In brief outline, let us here recall some great demonstrated truths as we examine the fallacies of the advocates of the Judicial Recall in the assumptions which they make as to the nature and functions of our constitutional form of government.

#### *The Fallacy of Disregarding Human Fallibility*

The first and most inexcusable fallacy is the assumption that the existence of evils, political, economic or judicial, arising in connection with this or that department of government, is necessarily an indictment of the administration of the government, of the particular department in connection with which the evils are found to exist, or of the government itself. Such assumption disregards the ever present and irremediable element of human imperfection. It is not and never can be within the power of man, at any stage of civilization, to establish, maintain and administer any institution, governmental, sociological, industrial or otherwise, free or even substantially free from incidental oppression, injustice and inequality, or from sacrifice, to some degree, of natural and theoretical rights of person and of property. The crudest social compact involves, to a greater or less extent, sacrifice. The most perfect form of government must involve the same sort of sacrifice and, with its human element, also many evils, both those avoidable and those unavoidable, evils which in their concrete application instance injustice, inequality and even oppression. The merits of any particular form of government or

of its administration, therefore, are not decided by the fact of the existence or non-existence of this or that evil, nor from the presence or absence of this or that instance of injustice, inequality or oppression. The question is: In view of the experience of mankind as known by the history of governments, what form, and what provisions of fundamental law, will in the end most tend to diminish the classes or instances of evil? Under what system may the natural evolutionary processes of change, by the guidance of intelligent efforts for reform and progress, best and furthest work out in the direction of universal freedom, equality and justice?

The fathers of our constitution did not predict or expect a perfect government free from the results of human error in its administration. The constitution was established, not with the expectation of forming a "perfect" union, but a "more perfect" union, and to establish—not finally and without exceptional failure, but in general, so far as human foresight and experience could provide—justice, domestic tranquillity, means of common defence, the blessings of liberty to ourselves and posterity and to provide the best means for working out, with all the vicissitudes of success and failure, those blessings of liberty. Its object was to establish a government which should in the long run, all things considered, be most conducive to "promote the general welfare" of the people who should live under it.

That the accomplishment of these purposes is best assured by our constitution is taught by the science of government, by experience and by authority. Gladstone characterized our constitution as "The most wonderful work ever struck off at a given time by the brain and purpose of man." No change in the essential form of government, no fundamental constitutional change, can be justified on the plea of the existence of unremedied or even irremediable evils. As expressed in the words of Lincoln:

Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step while there is any possibility that any portion of the ills you fly from have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from—will you risk the commission of so fearful a mistake?

Appeals to popular prejudice inducing unrest and discontent at existing evils, should be met with distrust. Clamors for the

“rights” of the people should be checked with a steadfast but more altruistic regard for the preservation of the constitution which was expressly established to safeguard those rights. There should be kept in mind the warning of Hamilton when he said:

A dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has found a much more certain road to the introduction to despotism than the latter, and that of those men who have overturned the liberties of republics the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants.

### *The Fallacy of Pure Democracy*

The fundamental fallacy of the Judicial Recall is the assumption that the object of our form of government and the goal toward which its administration should work are the establishment and promotion of a government directly by the people, in which the will of the majority, as expressed at the polls, should at all times receive the nearest possible immediate response through the machinery of the different departments by which the powers of government are administered. The assumption is, not merely that ours was to be a government generally democratic in form and in essence, but that in fact it was intended to be one of pure democracy; and that any substantial check or restraint upon the responsiveness by governmental departments to the will of the people expressed through their majorities from time to time, are, when shown by experience to be real checks and hindrances, imperfections, the immediate or gradual elimination of which should be the chief object of any reform movement which is entitled to be denominated “progressive.” It is the presentation of this fallacy, regarding the fundamental object of our system of government, to the individual voter, whom this fallacy places upon a pedestal, as the direct representative of the democratic idea of “sovereignty” and whose sovereign rights the same fallacy has assumed to have been usurped,—it is this fallacy which is the root of all the misinformation, misunderstanding, deceit and illusion which have given the Judicial Recall its seeming popularity. Its falsity, however, is demonstrated by even the most superficial consideration of the nature and character of our form of government, of the functions of its different departments, and of the objects and efficiency of our constitution.

Our government is a democracy, but it is a *constitutional* democracy; and the very object of the constitutional feature is to place in the way of the sovereign people those limitations, checks and balances which, while not preventing enforcement of the will of the sovereign people, should insure the wise and deliberate exercise only of wise and deliberate, and therefore properly restrained, sovereign authority. Its primary object was to prevent the immediate enforcement of the unrestrained, unchecked and unlimited will of the majority, whether expressed at the polls or otherwise. Sovereignty invested in a single person or in a few, passing, without consideration of other distinctions, by inheritance, checked only by promises of respect for individual rights,—promises wrested from the sovereignty by force of arms, as were those of our Bill of Rights from King John at Runnymede, rights, however, vouchsafed only by ties of tradition or by precedent,—constituted the tyranny of monarchy, the evils and abuses of which, fresh in the minds of our constitution makers, rendered it abhorrent to them.

But, learned in the history of nations and conscious of the fate of states subjected to the unrestrained will of the people, they saw another danger to be avoided, greater than that of the tyranny of monarchy. Our government must insure to its people not only the blessings of liberty, not only the natural right of dominance by the people as sovereign, but it must safeguard forever those blessings and rights by a form of government adapted to that purpose, and the stability of which should, as far as human intelligence could provide, be made certain against the self-destructive elements inevitably accompanied by an absence of proper checks, limitations and balances, upon even the sovereign power of the people. They were not satisfied to leave such checks and limitations to rest upon precedent and to be presented by analogy or implication from the recorded history of events. They must be expressed and recorded as the supreme law of the nation, paramount to the will of the sovereign power and to the will of its representative governmental departments. In their wisdom they saw in this express and written, fundamental and paramount law the only sure and safe protection against the dangers of the tyranny of democracy. Recognizing the fact that, with further industrial, economical and social development, the fundamental law thus established might not be sufficiently elastic for the necessary adaptation, they provided for amendment

by a method, slow but not cumbersome, as facile and speedy as could be consistent with deliberate and well considered action and therefore with the necessary safeguards against the results of caprice, temporary passion or prejudice. While exercising the greatest wisdom of their times, they bowed wisely and consistently to the wisdom of future generations, but only to a wisdom which reaches and acts upon sound judgment, as their judgments were then pronounced, after dispassionate contemplation, deliberation and discussion of facts, theory and precedent.

The government established is a government "by the people." It is the nearest to a government by majorities that can be established consistent with the necessary elements of stability and the safeguarding against tyranny, which safeguards can only be retained by the constitutional checks and limitations upon the exercise of the sovereign authority and of the powers of its representative departments in the government. Any measure which, like the Judicial Recall, ignores these safeguards or their necessity is subversive.

Daniel Webster said in 1848:

Whoever says, or speaks as if he thought, that anybody looks to any other source of political power in this country than the people must have a strong and wild imagination for he sees nothing but the creations of his own fancy. He stares at phantoms. Let all admit what none deny, that the only source of political power in this country is the people. Let us admit that they are sovereign for they are so, that is to say, the aggregate community, the collected will of the people, is sovereign.

Abraham Lincoln said:

A majority held in restraint by constitutional checks and limitations, always changing easily with deliberate changes of popular opinion and sentiment is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism.

Quoting these words from Lincoln, Senator Elihu Root at the recent Chicago convention said:

That covenant (the Bill of Rights) between power and weakness is the chief basis of American prosperity, American progress, and American liberty. . . .

We know that there is no safe course in the life of men or of nations except to establish and to follow declared principles of conduct. There is a divine principle of justice which men cannot make or unmake, which is above all governments, above all legislation, above all majorities. The limitations upon arbitrary power, and the prohibitions of the Bill of Rights which protect liberty and insure



justice, cannot be enforced except through the determinations of an independent and courageous judiciary. . . .

So the three departments, the executive, legislative and judicial, were established, each separate from and independent of the others. No changing whim of the people could, even in two years, change the entire legislative representation, for the senate could not be entirely changed except after six years. It vested in the legislative department certain specified powers and expressly prohibited the exercise of other powers by either the federal or the state governments, expressly reserving to the states respectively, or to the people, all powers not so expressly delegated to the United States nor prohibited to the states. In order to avoid the oppression of the tyranny of undeliberate or capricious actions by the sovereign people, it was directly and expressly provided in section 9, Article 1, against the suspending of the privilege of the writ of *habeas corpus* and the passing of bills of attainder or *ex post facto* laws, against the levying of disproportionate taxes and of duties upon articles exported between these states; prohibiting any state from enforcing any law impairing the obligation of contracts, and from levying any impost or duty. And, later by amendments, the same supreme law prohibited the congress from interfering with the establishment and free exercise of religion, with freedom of speech and of the press, or the right of people peaceably to assemble and to petition for redress of grievances; against the quartering of soldiers in any house without the consent of the owner, the violation of the security of person and property against unreasonable searches and seizures without warrants properly verified and issued, depriving any person of his life, liberty or property without due process of law, and the taking of private property for public use without compensation; and insuring the right of trial by a jury for criminal prosecutions and the protection of the accused against arbitrary and illegal punishment, the prohibition of excessive bail, of excessive fines and cruel punishments; the prohibition of slavery or involuntary servitude at any place within the jurisdiction of the United States; and further prohibiting any state from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of his life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the law; and prohibiting either the United States or any state from denying or abridging the

rights of citizens on account of race, color or previous condition of servitude.

Read and consider these limitations, take any one of them and, as an individual, ask yourself seriously the question whether you, yourself, from considerations of your own selfish interest, would willingly and deliberately hazard the risk of giving up forever the safeguard to your life and liberty expressly vouchsafed by the protective provisions thus established as the law of the land, which no legislature and which no majority of the people may ever capriciously set aside. If you happen to feel no selfish need of such protection, then consider the question as one touching your own posterity, or as one concerning the entire citizenship of this republic and those who shall come after them, and at the same time concerning the very integrity of the government under which you and yours, and they and theirs, are to live. Not until you have brought yourself to the conclusion that, not merely one or a few of such limitations, but each and all of them, without exception, are unnecessary and unwise, and that they, each and all, may at any time be disregarded,—not until then can you be a consistent supporter of the Judicial Recall. These are questions which are, as is the question here under consideration, finally answered in only one way by any citizen who has calmly considered all the facts pertaining to the issue and whose conclusion is the result of cool, deliberate and impartial judgment.

These are some of the limitations placed upon the legislative powers of the people in the federal constitution, as similar limitations have been placed in all state constitutions, for the very reason that the judgment and discretion of the people could not, at all times, and without restraint and limitations, be relied upon, especially in times of agitation and in times of political or economic crisis. The necessary safeguards could be insured only by these express limitations upon the power of the sovereign people to legislate, and upon the privilege of the people to have legislation enforced.

The functions, powers and duties of the executive department and of its members were set forth and limited by express provisions.

By the same constitution, as by similar provisions in all state constitutions, there was also established a third department of government, the judicial, with certain express original jurisdiction and with such appellate jurisdiction, both as to law and fact, as should be provided by the legislative department. And by the same instrument it was provided (Art. VI) that,



This constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

And finally, it was expressly provided (Art. VI) that,

The senators and representatives before mentioned, and the members of the several state legislatures and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution.

Such are the nature, purpose and effect of the provisions defining the functions of our constitutional government; and it is in respect to these and similar provisions that it differs upon the one hand from a monarchy and upon the other hand from a pure democracy. While it is a government by the people, it is a government of checks upon the unrestrained exercise of sovereign authority. Its making was the freest possible from any passion or prejudice. In the words of Jay:

Men who possessed the confidence of the people, and many of whom had become highly distinguished for their patriotism, virtue and wisdom in times which tried the minds and hearts of men, undertook the arduous task in the mild season of peace, with minds unoccupied with other subjects. They passed many months in cool, uninterrupted and daily consultation, and finally, without having been awed by power or influenced by any passions except for love of their country, they presented and recommended to the people the plan produced by their joint and very unanimous councils.

Their combined learning in the science of government has not been equaled by any body of men ever assembled for the same or similar purpose. As expressed by Hamilton:

If it had been found impossible to have devised models of a more perfect structure than the enlightened friends of liberty would have been obliged to have abandoned that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood which were either not known or imperfectly known to the ancients. The distributions of powers into distinct departments, the introduction of legislative balances and checks, the institution of courts holding their offices during good behavior, the representation of the people in the legislatures, by deputies of their own election—these are wholly new discoveries, or have made their principal progress toward perfection in modern times. They are the means and power by which the excellencies of representative government may be retained, and its imperfections lessened or avoided. . . .

They heeded and applied the warnings of authority and of experience. The details of their structure varied from the ideal only in

so far as hard experience and wise precept showed to them the necessity of restraining safeguards in order to insure practicability and stability.

Aristotle, nearly four centuries before the Christian era, said:

One species of democracy is where the public offices are open to every citizen and the law is supreme. Another species of democracy is where the public offices are open to every citizen, but where the people and not the law is supreme. The latter state of things occurs when the government is administered by psephismata (by popular vote) and not according to laws, and it is produced by the influence of the demagogues. . . . But where the laws are not supreme, demagogues arise; for the people become as it were a compound monarch, each individual being only invested with power as a member of the sovereign body; and a people of this sort, as if they were a monarch, seek to exercise a monarchical power in order that they may not be governed by the law, and they assume the character of a despot; wherefore flatterers are in honor with them. A democracy of this sort is analogous to a tyranny (or despotism among monarchies). Thus the character of the government is the same in both, and both tyrannize over the superior classes, and psephismata are in the democracy what special ordinances are in the despotism. Moreover, the demagogue in the democracy corresponds to the flatterer (or courtier) of the despot; and each of these classes of persons is the most powerful under their respective governments. It is to be remarked that the demagogues are, by referring everything to the people, the cause of the government being administered by psephismata, and not according to laws, since their power is increased by an increase of the power of the people, whose opinions they command. The demagogues likewise attack the magistrates, and say that the people ought to decide and since the people willingly accept the decision, the power of all the magistrates is destroyed. Accordingly, it seems to have been justly said that a democracy of this sort is not entitled to the name of a constitution, for where the laws are not supreme, there is no constitution. In order that there should be a constitution, it is necessary that the government should be administered according to the laws, and that the magistrates and constituted authorities should decide in the individual cases respecting the application of them.

Burke, in his reflections on the French Revolution, said:

Until now we have seen no example of considerable democracies. The ancients were better acquainted with them. Not being wholly unread in the authors who have seen the most of these constitutions, and who best understood them, I cannot help concurring with their opinion that the absolute democracy, no more than the absolute monarchy, is to be reckoned among the legitimate forms of government.

Webster, in his speech on the Rhode Island government, said:

The people cannot act daily as the people. They must establish a government and invest it with as much of sovereign power as the case requires. . . .

The exercise of legislative power and the other powers of government immediately by the people themselves is impracticable. They must be exercised by representatives of the people, and what distinguishes the American government as much as anything else from any government of ancient or modern times, is the marvelous felicity of the representative system. . . . The power is with the people, but they cannot exercise it in masses or per capita. They can only exercise it by their representatives. . . . It is one of the principles of the American system that the people limit their governments, national and state. It is another principle, equally true and certain and equally important, that the people often limit themselves. They set bounds to their own powers. They have chosen to secure the institutions which they established against the sudden impulse of mere majorities. All our institutions teem with instances of this. It was this great conservative principle in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities. . . . It is one remarkable instance of the enactment and application of that great American principle that the constitution of government should be cautiously and prudently interfered with and that changes should not ordinarily be begun and carried through by bare majorities. . . . We are not to take the will of the people from public meetings, nor from public assemblies, by which the timid are terrified and the prudent are alarmed, and by which society is disturbed. These are not American modes of securing the will of the people, and never were.

Washington recognized the impracticability of a pure democracy and of the necessity in any form of government of restraint upon the exercise of the will of majorities. "It is on great occasions only," he said, "and after time has been given for counsel and deliberate reflection that the real voice of the people can be known." And the following are also his words:

Republicanism is not the phantom of a deluded imagination. On the contrary, laws under no form of government are better supported, liberty and property better secured, or happiness more effectually dispensed to mankind. . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment, in the way which the constitution designates. But let there be no change by usurpation; for, though this in one instance may be the instrument of good, it is the customary weapon by which governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can at any time yield. . . . Towards the preservation of your government, and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular opposition to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the constitution, alterations, which will impair the energy of the system, and thus to undermine what cannot be directly overthrown. . . . This government, this offspring of our choice,

uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of liberty. . . . The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists, till changed by the explicit and authentic act of the whole people, is sacredly obligatory upon all.

Madison said in the *Federalist*:

A pure democracy can admit of no cure for the mischiefs of factions. A common passion of interest will in almost every case be felt by a majority of the whole. A communication and concert result from the form of government itself, and there is nothing to check the inducement to sacrifice the weaker party or any obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence. Their conditions have ever been found incompatible with personal security or the rights of property, and have in general been short in their lives as they have been violent in their deaths. Theoretical politicians who have patronized this species of government have erroneously supposed that by reducing mankind to a perfect equality in their political rights they would at the same time be perfectly equalized and assimilated in their possessions and opinions and their passions.

Lecky, in his "Democracy and Liberty," says:

One thing is absolutely essential to its safe working, namely, a written constitution securing property and contracts; placing difficulties in the way of organic change; restricting the power of the majorities, and preventing outbursts of mere temporary discontent and mere casual conditions from overturning the main pillars of the state.

Mill, in his essay on "Government," says:

In this great discovery of modern times, the system of representation, the solution of all the difficulties, both speculative and practical, will perhaps be found. If it cannot, we seem to be forced upon the extraordinary conclusion that popular government is impossible. . . . The community can act only when assembled, and when assembled it is incapable of acting. The community, however, can choose representatives.

Tucker, in his work on the Constitution, says:

Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in lawmaking. It is the only practicable way by which a large country can give expression to its will in deliberate legislation. Give suffrage to the people; let lawmaking be in the hands of their representatives; and make the representatives responsible

at short periods to the popular judgment, and the rights of men will be safe, for they will select only such as will protect their rights and dismiss those who, upon trial, will not. . . . The government of the numerical majority is the mechanism of brute force.

The federal supreme court, speaking through Chief Justice Fuller, after quoting from Webster's argument in the Rhode Island case, said in the case of *In re Duncan*, 139 U. S. 449, 461:

By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

Senator Henry Cabot Lodge, in his recent address, "The Constitution and its Makers," says:

The destruction of an independent judiciary carries with it everything else, but it only illustrates sharply the general theory pursued by the makers of the constitution. They established a democracy, and they believed that a democracy would be successful; but they also believed that it could succeed solely through forms and methods which would not make it impossible for the people to carry on their own government. For this reason it was that they provided against hasty action, guarded against passion and excitement, gave ample room for the cooler second thought, and arranged that the popular will should be expressed through representative and deliberate assemblies and the laws administered and interpreted through independent courts. Those who would destroy their work talk continually about trusting the people and obeying the people's will. But this is not what they seek. The statement as they make it is utterly misleading. . . . The framers of the constitution made it in the name and for the benefit of the people of the United States; for the entire people, not for any fraction or class of the people. They did not make the constitution for the voters of the United States. They recognized that the popular will could only be expressed by those who voted and that the expression of the majority must in the end be final. But they restrained and made deliberate the action of the voters by the limitations placed upon the legislative, the executive, and the judicial branches, so that the rights of all the people might be guarded and protected against ill-considered action on the part of those who vote. Those who now seek to alter the fundamental principles of the constitution start with a confusion of terms and a false proposition.

These are some of the considerations by which is demonstrated the fallacy of pure democracy, or the fallacy of direct adjudication of constitutional questions by popular vote.

*The Fallacy of Judicial Usurpation*

Another distinct but in many respects correlated fallacy indulged in by the advocates of the Judicial Recall is in respect to the nature and propriety of the powers of the judiciary. Where the evident functions of the court are admitted, their exercise, even within constitutional limits, is criticised as unwarranted and arbitrary; and the very existence of such powers is made the object of denunciation. From such proceed an excoriation of the constitutionally established powers of the judiciary and a demand that, by the indirect method of the Recall of Judges or by the more direct method of the Recall of Judicial Decisions, the protective and safeguarding restraints and limitations upon the immediate and direct enforcement of the will of the majority be made ineffective. Ex-President Roosevelt in an editorial in the *Outlook* of March 9, 1912, denounced our system of restraint by express limitations and held up as exceptional and unnecessary the admitted power of the judiciary, in this country, to decide between the logical requirements of a written constitution and the seeming requirements of a statute passed ostensibly for the purpose of improving social or economic conditions. He said:

I speak purely of the kind of decisions which only American courts are entitled to make, the kind of decision which no judge in our neighbor Canada, *in Australia*, in England, in Germany or in France has the right to make, or would for one moment be permitted to make,—I am speaking of the action of the court of a state when it declares that a law passed in the collective interests of the whole community is unconstitutional.

The less shrewd, the more ingenuous and frank advocate, the typical advocate, of the Judicial Recall carries his fallacy to the extent of an assumption and express statement that the courts, having originally been established as a useful, if not necessary, department of government, have actually usurped powers and functions in no wise originally intended for them; that they have arbitrarily and without constitutional warrant arrogated to themselves a sort of final despotism, inconsistent with all proper theories of our form of government, and have asserted by gradual usurpation a sort of sovereignty of their own at war with the real sovereignty of the people. It is by such usurpation, it is claimed, that the courts now exercise, the power to declare invalid and unenforceable statutes found repugnant to constitutional provisions. It is asserted that these usurped powers should be taken away by other, and, as it is said, perhaps



similar, arbitrary methods defying all constitutional considerations; so that thus there may be recovered to the people themselves the powers which have been insidiously but wrongfully wrested from them. This fallacy persists, from the covert misleading attacks made upon our constitution through comparison with unconstitutional systems of monarchy or democracy, systems impossible for us, to the open, unqualified denunciation of our entire system of government and of its constitution, and the open charge, as the basis of the argument for the Judicial Recall, that the judiciary have stolen, by gradual, unconstitutional encroachment and usurpation, the real sovereignty which was intended to rest at all times and under all circumstances directly with the people. Such is the vice of the insidious and misleading appeal to the voter, made by the self-seeker for notoriety or for office, who pretends to teach his hearers that government "by the people" means, not our form of government as administered under the constitution, but another and different system of government; or that it means our system, so far as mere matter of form is concerned, but administered in such a way that its essence shall be lost and only the mere form left, fragile and responsive, without limit and without delay, to the changing demands of the people, as expressed from time to time by their majority vote. Such is the vice of the cry that the constitution and the law must not be greater than their makers; that judges are merely the servants of the people; that the people made the fundamental law and that they make the statutes and that their last expressed will, as represented by a temporary majority, should be directly enforceable as a law paramount to all others.

Let us, who as citizens have sworn to support our constitution and our government and laws under that constitution, and who, respecting our oaths, insist that changes in government, or in the administration thereof, shall be brought about only through constitutional methods, consider for a moment the constitutional functions of the judiciary and the necessity of the preservation of these functions, and particularly of its independence.

The necessity of constitutional limitations as essential to the efficiency and stability of our form of government has been shown. But these limitations and restraints could not be enforced, except through a judicial department; and it was for that purpose primarily that the judicial department was established. It was upon the courts under our system of government that the only ultimate reliance

could be placed to safeguard and enforce the constitutional limitations expressly placed upon the sovereign power of the people. It was expressly made the duty of the federal and of the state courts to observe this fundamental law as the supreme law of the land; this is the duty which has been performed by the federal and state courts and it is by the performance of this function that our constitutional government has been preserved. This duty included the power of the courts to declare invalid any statute if repugnant to constitutional provisions. That this duty and power were originally imposed upon the courts as an essential feature of the new form of government and is in no degree a usurpation or after-thought, is shown by the fact that the deliberations of the constitutional convention at all times assumed such power to be intended for the judiciary. That it was so understood by the several states in ratifying the constitution is shown by the fact that the existence of this very power in the judiciary was everywhere urged upon the states as the great safeguarding provision which, as against all the timorous feeling of uncertainty, should make them assured of the safety and efficiency of the new constitution and act as a compelling reason for its unanimous adoption. Ellsworth, on January 7, 1788, urging the ratification of the constitution upon the Connecticut convention, said:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers if they make a law which the constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the federal government, the law is void; and upright, independent judges will declare it so.

So at the same period Hamilton was urging in the *Federalist*:

There is no liberty where the power of judging be not separate from the legislative and executive power . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution . . . Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice whose duty it must be to declare all acts contrary to the commands of the constitution void.

So Chief Justice Marshall, in the case of *Marbury v. Madison*, 1 Cranch, 368, 388, summarizes the constitutional provisions including those making it the supreme law of the land and binding upon all courts, federal and state, and requiring all judges to swear to its sup-



port and the requirement by the yet sovereign people, through their legislatures, of an oath by every judge that he "will faithfully and impartially discharge" all the duties incumbent upon him according to the best of his abilities and understanding, "agreeably to the constitution and laws of the United States;" and he demonstrates that the power and duty of the courts to declare invalid unconstitutional statutes are imposed not only by necessary implication but by express provision. He said:

This original and supreme will [the people] organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, [either] that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

### *A Significant Example of Fallacious Statement*

Ex-President Roosevelt cites Australia as a country where the powers of the courts, as exercised in the United States, find no parallel. As pointed out by Justice Burch of the Kansas supreme court in a recent address, it is the instance of Australia which shows a deliberate adoption of our constitutional methods and of the very powers of the judiciary which are now widely made the subject of denunciation. As late as January, 1901, upon the address of all the Australian colonies to the British crown, there was put into effect, for the government of the people of the entire Australian continent, a written constitution modeled upon that of the United States of America. For

five years representatives of the colonies had discussed with the greatest learning and research the merits and demerits of different forms of government as shown by the experience of parliamentary systems of government and of that of the United States and other countries, with the result that the American precedent became the guide and model of a new continental government. It followed closely, in many respects, the American model in its separations of federal and state authority, and in its division of power between the three separate and independent, legislative, executive and judicial departments, and, what is more important, with a federal judiciary as the supreme interpreter of the constitution and with the constitution as the supreme law of the land. And for ten years prior to the time when ex-President Roosevelt was claiming a repudiation by Australia and other nations of the power of the judiciary to prevent enforcement of a legislative statute as repugnant to the supreme written law of the land, the courts of the commonwealth of Australia had, following the precedent of decisions of the supreme court of the United States, been declaring numerous statutes, even some affecting human rights from a vital standpoint, "*ultra vires*," that is, unconstitutional. Such decisions included those declaring invalid the federal act establishing a worker's mark, passed in the interests of union labor, as an invasion of the separate powers of a state over domestic commerce and industry; a federal act attempting to control disputes between employer and employee on state railways; and an excise tariff act by which it was attempted indirectly to secure to workmen a share of the profits accruing to employers from protection taxes.

Another incident which has been overlooked by the chief American advocate of the Recall of Judicial Decisions is that the measure of the appeal to the people from the decisions of the courts on constitutional questions was, over a decade ago, presented to the Australian constitutional convention, and although fully debated, received no substantial support except from the member proposing it and was finally withdrawn. It was unanimously agreed that this indirect method of amending or modifying the constitution was inconsistent with the form of government proposed, which gave ample opportunity for all proper amendment by methods requiring deliberate action.

This recent well-considered approval, by an exceptionally intelligent and progressive people of an entire continent, of our

constitutional system, now denounced to the American people by an American of world-wide reputation, is a most significant, though silent, answer to the advocates of the Judicial Recall fallacy.

#### THE PROPOSED REMEDY OF JUDICIAL RECALL ANALYZED

In less strenuous times, it would seem almost puerile to detail, even to the extent of the above statement, the nature and functions of our government and of its judicial department. The necessity of doing so now only illustrates the truth of the maxim that it is necessary now and then to get back to first principles. It is the first principles of government which are ignored by the advocates of the Judicial Recall. Our government is not one of pure democracy, but is a republican or *constitutional democracy*. It is a government not directly by majorities, whose changing whims shall be enforced directly and immediately from time to time as people may be affected by passion or prejudice. It is one where for self-protection, for the protection of each constituent member of its citizenship, there are self-imposed general rules of conduct, general limitations of powers upon the federal and upon the state legislatures. It is a government by a majority, but by a majority acting through representatives and at the same time restricted within express limits, limits which are unchangeable except through deliberate, well-considered action. These restrictions and limitations are the supreme law of the land and it is the express duty of the courts to enforce their observance. The primary function of the courts is to stand between temporary demands of a majority and the oppression and injustice which must, or at least may, follow unrestrained power. For the preservation of this safeguarding element, the independence of the judiciary is essential. It must not be cringing or subservient to a majority. Its judges must be the "servants" of the people only in the sense that, for the people, they carry out fearlessly, impartially and judicially the duties which are imposed upon them. Any measure which strikes at their independence strikes at the very foundation of the judicial department and at the very foundation of our government itself.

In order properly to perform these functions the element of independence is absolutely essential. Without the quality of absolute independence, the judicial department becomes a mere reflector of public opinion, constantly changing with the temporary whims, passions and prejudices of the majority.

It was the better to preserve the independence of the judiciary that the tenure of office during good behavior was advocated and adopted. Eighty-seven years before the adoption of our constitution, the King of England had the arbitrary power of unseating a judge; but that power was taken away by the Act of Settlement, which secured to the judges their tenure of office during good behavior, subject only to impeachment by parliament. In so much did the Act of Settlement make the government of England take on a feature, republican in form, for the power of removal of judges was given to the representatives of the people, not to the people themselves directly, but to the parliament which was given the duty to hear, try and determine, and which was a body so constituted that it could perform that function.

So, in advocating the constitution and the good behavior tenure, Hamilton said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this all the reservation of particular rights or privileges would amount to nothing.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion *dangerous innovations* in the government and serious oppressions of the *minor party* in the community.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial officers in point of duration; and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

In order to avoid the danger of subserviency by reason of short-term elections, the Massachusetts constitution, as late as 1870, provided for tenure of office for judges during good behavior, subject to removal by impeachment. As stated in that constitution:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the

laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and *independent* as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people and of every citizen that the judges of the supreme judicial court should hold their offices as long as they behave themselves well.

It necessarily follows that any measure of reform is obnoxious and unwise in so far as it is antagonistic to these basic principles of our form of government. Any measure which is directly repugnant to these principles is not only inexpedient, but absolutely indefensible. Such is the character of the Judicial Recall, whether proposed in the form of the Recall of Judges or of Judicial Decisions. The Judicial Recall is not remedial, but baneful in its nature. It is not either constructive or progressive, but is destructive and reactionary. This is true whether viewed from a mere theoretical statement of its elements or from the concrete instances of its attempted application. It means a replacement of a properly adjusted, stable, practicable, successful, constitutional government with a form of government shorn of constitutional protective features. It directs all the forces of reform into a downward path leading to further elimination of the very rudiments of our republican system. It would establish the precedent of the yielding up of fundamental principles to the temporary pressure of elements of unrest, instead of insisting upon a constructive adjustment consistently and scientifically worked out in such a way as to save to the American people these protective features of our form of government which distinguish it from despotism upon the one hand, and from disorder, socialism and anarchy upon the other.

### *The Recall of Judges*

The Recall of Judges has, by the very terms in which it is usually expressed and presented, a certain allurements which blinds the superficial observer to its essential vices. Like the Recall of Judicial Decisions, it is founded on the fallacy of human infallibility, on the fallacy of a sort of divine right belonging to the people to have the sovereign authority, ultimately imposed in them, exercised directly upon the command of a majority, and, finally, upon the fallacy that the power exercised by the courts to invalidate unconstitutional statutes, because it operates as a check upon the direct exercise of the people's sovereignty, is, for that reason, an obstacle and a menace

and is a power attained by usurpation. From such origin has the Recall of Judges arisen and is now put forward as the remedy and solution of all the evils complained of. Its impracticability is demonstrated by theory and by experience.

As applied in Oregon and, with some modifications, in other states, the Recall of Judges means that a judge may sit secure for the first six months of his office, and that, if at any time thereafter, for any reason, or without reason, twenty-five per cent of the voters of his district file a petition demanding his recall, stating in such petition in any manner they choose the complaint which they have against him in not to exceed two hundred words, which limited charge shall be placed upon a ballot at an election upon short notice, then the judge, if he does not resign, must go to the polls with the privilege of having placed upon the same ballot his defense in not to exceed two hundred words, and must stand for election against other candidates selected by his opponents, and that, upon such manner of charge and defense, the voters of his district shall decide whether he shall be retained upon the bench or an opposing candidate be put in his place.

The mere statement of the provisions for the recall is sufficient to condemn such a measure not only as repugnant to the proper administration of justice, but as a serious injection into our system of government of a travesty upon justice.

#### *A Summary, Arbitrary and Unrestrained Power*

It is not necessary to defend other methods of removal of judges nor to discuss reform measures by which the method of removal by impeachment may be made more efficient. The removal by address of the legislature or by impeachment involves the constitutional elements of a notice to the accused, an opportunity for hearing, a hearing upon the facts and upon the law, and an adjudication in accordance with the fundamental constitutional principles protecting the rights of every person accused of an offence. The recall is not only devoid of all of these constitutional elements, but involves all the vices against which these fundamental protective features were intended. Even if the causes for recall were expressly confined to misfeasance and malfeasance, and even if specific charges should be required, how could it be possible for a proper or sufficient notice to be given to the accused in the limited space of two hundred words?



Suppose the charge be one of incorrectness in a decision involving questions of fact and law, how could a defence to such a charge be made in the same limited space? And, even if issues of fact and law were sufficiently framed, what guaranty is there that any of the adjudicators, that is the voters, who finally pass upon the issues, shall consider these or any issues? The result must be that the very bringing of an indictment by the filing of a recall petition shall be taken by a large number, and perhaps by a majority, as of itself sufficient proof that a change is desirable. There can be no hearing except by public clamor and upon statements, however false, which are spread broadcast by newspaper and by pamphlet and by rumor, without the slightest pretense of verification even by any form of oath. At the very best, it involves a "trial" upon mere hue and cry, and a decision upon complicated and important issues by the mere arbitrary dictum of a misinformed and prejudiced populace.

But, as to the Recall of Judges, we are not without experience; and the history of its attempted application further demonstrates its vice. It has been attempted to be justified by the claim that in Oregon, for instance, where it has been in force for four years, no abuse of the privilege has arisen and no judge has actually been recalled. But the strongest indictment against the recall comes from its advocates, or its apologists, who instance its application in Oregon and other states. One writer refers to the recall in that state as the "final crowning act to complete the temple of popular government here." He admits, however, that actual recall movements have in many cases been prevented because, under some court decisions and the opinion of an attorney-general, it is considered that additional legislation may be required to allow its operation. But the exceptional cases of its application are sufficient to demonstrate its vice. It is admitted that the recall petitions are circulated by personal, partisan opponents and, in the case of judges, by dissatisfied litigants, and that names are gathered by irresponsible circulators, whose only object is to receive the five cents a name reward for all names procured upon the recall petition.

Neither the petition nor the two hundred words upon the ballot pretend to disclose all the motives nor the chief motives for the recall demand. A municipal officer incurred the hostility of certain property owners, by opening, in accordance with his duty, certain streets which had been illegally closed. The charge against him was simply

that he was "inefficient," "immoral," "untruthful" and "arbitrary." A local war between two banks divided a city against itself and one opposing faction instituted a recall against a hostile city official, charging simply that he was "unsatisfactory" and had "illegally diverted public funds," etc. A city mayor adopted a progressive policy in regard to public improvements and the charge was in vague terms of "improper expenditure," "incompetency," etc. Again, a councilman had furthered an ordinance deemed by the labor unions prejudicial to their interests. He was recalled upon a petition stating simply that he did not "faithfully and efficiently represent" the interests of his ward. The candidate put up to oppose him won in the recall election. In another case where the real issue was the attitude of a councilman with reference to the prohibition law, the charges were of "unsatisfactory administration," "abuse of the emergency clause in the enactment of ordinances," etc., with no reference to the real object of the recall movement. Cases where the recall proceeded or was determined upon the charges stated in the petition and ballot, and where the real basis of the movement was not merely personal or factional spite, are rare occasions. It is admitted that threats of recall are commonly used to bring into line with factional demands the action of administrative as well as of judicial officers.

While no actual recall of a judge has been obtained in Oregon, attempts at judicial recall have been made; and undoubtedly other and successful attempts would have been made had it not been for the supposed necessity for further legislative action in order to make it effective. An incompleated attempt at recall was made against a circuit judge because he sustained as legal the provisions of a city charter allowing the sale of intoxicants. The crucial instance of the application of the judicial recall in Oregon is that instituted against Circuit Judge Coke, who, upon the trial of one McClellan for the murder of a well-known citizen of Roseburg, instructed the jury that if they found certain facts, of which there was evidence favoring the defense, such facts would sustain the claim of self-defense and therefore of justifiable homicide. The instructions of the judge were exactly, in terms and in principle, in accordance with the law expressly stated by the Supreme Court of Oregon in another somewhat similar case. Their correctness is scarcely debatable from a lawyer's standpoint. The jury found the facts as claimed by the defense, and, following the instructions of the court, acquitted McClellan. Local



passion and prejudice against the defendant had been excited to the point of demanding conviction and were turned against the judge whose fairness and judicial qualities had never before been questioned. A recall petition was instituted and objection was made to the nature of the two hundred word charge as not being sufficiently specific to allow proper answer. The attorney-general held that under the law the charge need not be specific and that it might, as in that case, consist of merely a series of epithets applied to the judge complained of, as "incompetent," "unfair" and the like.

It is admitted by candid advocates that these abuses of the recall are inevitable and irremediable and that it is never possible to determine whether an official has been thereby deposed upon grounds asserted in the recall petition or others really the basis of the demand for the recall; for at election he must satisfactorily justify his entire official conduct and compete with the political ambition of other candidates precommitted upon any of the judicial questions at issue, and he must, at the same time, face personal opposition at a time when it has been brought to its most virulent pitch against him and in the midst of greatest feeling of discontent, passion or prejudice induced by ignorance, calumny and wilful machinations. It is admitted also that, as against possible influence in some cases of a salutary nature, there are many palpable instances where the very possibility of a recall has caused obvious "sins of omission" on the part of officials who refrain from enforcing the law, as they would otherwise than for the fear of a recall. Former advocates of the recall now admit that the representative and important factors of the recall, and particularly of the Recall of Judges, are caprice of the public, immaterial and extraneous issues, politics, personal revenge, and deliberate misrepresentation. One Oregon writer, referring to the position of a judge in that state, says:

It is unjust, it is degrading, it is inimical to his independence, that he should be compelled to defend his acts or politics or decisions with one hand and combat political ambition and personal popularity of candidates who may oppose him with the other.

### *It is a Destructive Measure*

In theory and in practice, therefore, the inevitable effect of the Recall of Judges is to deprive the courts of independence. The judge sitting subject to recall, has the threat constantly hanging over him

that a dissatisfied litigant, whether it be an influential individual or a community comprising perhaps the larger part of the constituent voters of his judicial district, may, at any time, without cause and by an arbitrary and summary proceeding, force him to resign or to subject himself to the humiliation of a recall instituted and carried through without any of the safeguarding elements to insure him even the form of a fair hearing or of a just determination. It drags him from his high position of an independent, judicial expounder of the law, to the position of a mere puppet who must perhaps make his decrees and his judgment false to his reason, to his conscience and to the law in order to avoid the degradation brought about by the recall petition.

What is true in the case of one judge is true in the case of the entire judiciary. The Recall of Judges means a dependent, cringing and vacillating judicial department; the destruction of all its essential functions. It is repugnant to our constitutional form of government.

### *The Recall of Judicial Decisions*

The Recall of Judicial Decisions, whether in the form presented by its leading advocate, or in any other form, is but a short cut to the disastrous results toward which the Recall of Judges more indirectly tends. The advocates of the Judicial Decision Recall cannot consistently repudiate the Recall of Judges for the two measures are based essentially upon the same vicious fallacies. So we are told by them that these two measures of Judicial Recall are not inconsistent, but that generally the Recall of Judicial Decisions would be the more effective in practice, and is generally to be preferred. As to the Recall of Judges, they say, "Why, yes, we are for that in any community or state where there is a real demand for it; otherwise not." This means simply that they are for the Recall of Judges for those who want it and they are against it for those who do not want it. As to the Recall of Judicial Decisions, its leading sponsor declares, with shrewdness and adroit phrase which, as he obviously thinks, cannot be clearly grasped and answered, that he stands for the Recall by a vote of the people of only such Judicial Decisions as (1) are rendered by state supreme courts in declaring state statutes unconstitutional, (2) where the litigation is not one between man and man, but only where it concerns some great economic or

social question involving the general welfare of the whole people or of a large class, and (3) where there is not involved the question of the validity of a statute as repugnant to the federal constitution. As to the class of decisions so specified, he would suspend the enforcement of the decree of the state supreme court, and refer the correctness of that decision to a vote of the people of the state. If sustained by such vote, then the decree shall be enforced, otherwise not.

The very suggestion of these limitations upon the application of this proposition of direct judicial adjudication by the people only emphasizes its inconsistency and repugnancy to the very fundamentals of our constitutional republican form of government. A people of a state, which is only a small portion of the field of our national jurisprudence, may become wrought up on some question which is purely local, or which involves the local application of some measure ostensibly meritorious in its general principles; or a state, as a whole, may become unduly agitated to the point of demanding a measure which is, in essence and in effect, manifestly repugnant to the fundamental principles of our government and to the established rights of person and of property. Obviously it is not wise and it is not safe to leave to the people of such locality alone the power of direct, immediate and final adjudication as to issues of constitutional law, the power by direct vote to set aside constitutional defenses established as the supreme law of the entire land as well as of the locality in question. Thus the very first limitation which is suggested for the application of the Recall of Judicial Decisions is illustrative of its entire fallacy.

But, again, it is indulging in a mere delusion to attempt to confine cases which are to be subject to popular adjudication to those which do not arise between man and man and to those alone which involve questions of general welfare. Any lawyer or judge knows, and any layman ought to know and recognize the fact, that almost without exception the great questions which have come before and which must come before the courts, involving considerations of questions of great national importance or of social welfare of the entire people or of large classes of people, arise and are decided in cases between individuals. Great questions of public interest are not decided in any distinct class of cases instituted for the consideration of those particular questions. They arise unexpectedly, as necessarily incidental but controlling, in proceedings between one

man and another, in which at first the direct and concrete object of the litigation is devoid of public interest. It is impracticable to enforce the distinction suggested between cases which shall be and those which shall not be adjudicable by an appellate court, whether such court be one of judges or be one composed of the voters of a whole state.

Nor can decisions subject to popular adjudication be confined to those invalidating a state statute on grounds other than that it is repugnant to the federal constitution. The provisions of the federal constitution already above outlined comprise, in almost the very words of that instrument, the principal provisions embodied in every state constitution. Almost without exception, wherever a state statute shall be found repugnant to a state constitution, it would at the same time be repugnant to the federal constitution, and the question adjudicated would really be the repugnancy of a state statute to the federal constitution. The adjudication by the people of the locality, therefore, if rendered, could not give assurance as to the law of local rights until the same question should have been passed upon by the federal courts. Neither can the adjudication made by popular vote be binding upon even the state courts in another similar instance; for the state courts are sworn to decide cases in accordance with the requirements of the federal constitution and the vote of the people could not change a principle of fundamental law established by judicial judgment.

Any measure by which there is given to the people of a locality the direct power of adjudication upon a constitutional question means the elimination of constitutional limitations and safeguards established for the security of liberty, of person and of property. In place of methods of careful and deliberate amendment of constitutions, it substitutes the spasmodic, vacillating and inconsistent expressions, made from time to time, of the arbitrary will of a majority temporarily in power. It substitutes for decree of judgment under the law, the spasmodic will or caprice of the mob. I use the word "mob," which in similar instances never refers to the people generally, but to large numbers of the people, and it may be at times a majority, acting under the influence of passion and prejudice, and against their own real interest, as distinguished from the people acting through forms and procedures of law, established with provisions safeguarding against the result of temporary passion and prejudices and operating in such a way and under such conditions

as ultimately shall insure expression of the calm, sober, deliberate judgment of the people as a whole. The term so used is not a denial but an affirmation, under a constitutional democracy, of a sovereignty vested in the people.

It is unnecessary to give instances of the opportunities of the abuse of the power of popular adjudication upon constitutional questions. We may not overlook, however, the instance of Wisconsin where, preceding the year 1911, a state-wide agitation had been made by an appeal to the passion and prejudice of the voters, to demand a statute by which a large class of property owners within the state, whose title to their property had been confirmed by repeated adjudications of the state and federal courts, should have their property taken from them by a legislative fiat and, by the same token, established in the state itself for general public use. The movement, denominated in Wisconsin as "progressive," was successful and the Wisconsin legislature of 1911 passed the now notorious water power act, the provisions of which, within a year were each and all, including the spirit and purpose of the act itself, declared unconstitutional by the Wisconsin supreme court, as repugnant to several provisions of not only the state but of the federal constitution. No lawyer or judge, acquainted with the first principles of the law of property rights or of constitutional law, will pretend to criticise that decision. Nevertheless, such was the prejudice which had been aroused throughout the state in favor of the confiscatory statute, there is no doubt that, if the Recall of Judicial Decisions had been there applicable, the people of the state would have voted within the time required for such a vote, and probably would to-day so vote, that the decision of the Wisconsin supreme court should not stand. By such popular adjudication, if it had been made in Wisconsin, the statute in question would have been sustained and would have remained effective until the question could be brought before the federal supreme court in the same or in a similar case; with the result that that which is one day property in possession of its owners would, for a long period become not their property but would be retained in the possession and control of the state; and after the end of a further period, when judicial judgment under the law finally reigns in place of the drastic and arbitrary decrees of popular passion, the same property would again have been returned to its legal owners.

It is futile to claim that the establishment of the Recall of Judicial Decisions would be consistent with the retention of constitutional government, or that its purpose and effect are any other than to eliminate constitutional safeguards. Even in attempting to answer the charge of President Taft that the proposed new system "would result in suspension or application of constitutional guaranty according to popular whim," which would destroy "all possible consistency" in constitutional interpretation, ex-President Roosevelt expressly referred, in his Carnegie Hall speech of March 20, 1912, to the system criticised as one "amending or construing, to that extent, the constitution,"—that is, to the extent of leaving the enforcement of any constitutional provision to popular vote. The supporters of his proposition, including a well-known publisher and editor, frankly assert that the people within the jurisdiction of any constitution, should, as sovereign rulers and as the makers of the constitution itself, have the power at any time by majority vote to amend, that is to "disregard," such constitution, and that the Recall of Judicial Decisions is sufficiently justified because it will have precisely such effect.

The system of a Recall of Judicial Decisions is inconsistent with our system of government. These two conflicting systems can not exist together. As stated by the Honorable Elihu Root in the speech which he delivered as president of the New York State Bar Association on January 19, 1912:

We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. We cannot maintain one system in part and the other system in part. The gulf between the two systems is not narrowed, but greatly widened by the proposal to dispense with the action of a representative legislature and to substitute direct popular action at the polls. A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever, in any particular case, it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has



produced and every great declaration for human freedom since Magna Charta—the truth that human nature needs to distrust its own impulses and passions, and to establish for its own control the restraining and guiding influence of declared principles of action.

*No Justification by Necessity for Recall of Judicial Decisions*

The occasion for the suggestion of the Recall of Judicial Decisions, as outlined by its chief advocate, lies in the peculiar fact that in cases where a state statute is claimed to be repugnant to the federal constitution, and its validity is upheld as against such claim, then such decision is directly reviewable by the federal supreme court; whereas, if the decision is against the validity of the statute and in favor of the claim of its repugnancy to the federal constitution, such decision is not so reviewable. This is because of the peculiar provisions of the act of congress by which the appellate powers of the federal supreme court are fixed; and the distinction is undoubtedly made so as to avoid as far as possible an unnecessary increase of the number of cases which would otherwise come before the federal appellate court. For a long time, representative lawyers of the country have considered this discrimination in allowing appeals as unwise; and the American Bar Association and many leading lawyers have been urging upon congress the desirability of changing the judicature act so as to render possible the review by the federal supreme court of all decisions of a highest state court, which determine to be either valid or invalid a state statute on the issue of its repugnancy to the federal constitution. It is for the people through their representatives in congress to say whether the remedy which is thus possible shall be adopted. It would be a logical, efficient and direct remedy for any evils for the cure of which the Recall of Judicial Decisions is urged. Therefore, besides objections to the Recall of Judicial Decisions on the ground of the vice, inexpediency and danger of such a measure, it is further shown to have no justification on the grounds of emergency or necessity, for there is open an easy, direct and constitutional remedy for all the evils which are complained of as a basis for that measure.

*The Judicial Recall is Unrepublican*

The federal constitution provides (Article IV, Section 4), "The United States shall guarantee to every state in the Union a republican form of government."

It is obvious that the Judicial Recall measure could not apply in any particular state without express provisions for that purpose in the state constitution. So far as state application is concerned, it must first be adopted as part of the state supreme law, as a feature of state government. The federal constitution contemplated a union of states having as their fundamental principles and laws of government only those which are and which should at all times remain essentially republican in form. And this provision of the constitution was adopted to protect, not merely against intrigues by foreign powers, but also against the ambition and intrigues of local agitators. Its purpose was to keep uniform, within specified limits, the local state governments. As pointed out by Madison in the *Federalist*, explaining the purpose and force of this provision:

But who can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigue and influence of foreign powers?

As long, therefore, as the existing republican forms are continued by the states they are guaranteed by the federal constitution.

The only restriction imposed on them is this, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

It is not left, therefore, to the caprice of each state, from time to time to determine whether it shall adopt features of government which are unrepugnant or to repudiate entirely the republican form.

As pointed out also by Madison in the quotation of his observation upon the nature of a "pure democracy" above given, a yielding up to the direct vote of the people, as in pure democracy, is to be avoided as repugnant to our republican form of government, a government under which the people act through their representatives or through representative departments, through whose carefully formulated deliberations and judgments, not the expressions of the temporary spasmodic will of the majority, but the deliberate, consistent and logical judgment of the entire sovereign people, refined and corrected by careful study and consideration by individuals or tribunals adapted to that purpose, may be enforced; and that, too, consistently with the existing provisions of the fundamental supreme law as laid down in the constitution. Not only is such representative element an essential feature of our republican form of government, but another and even more indispensable feature is the maintenance



of untrammelled courts of justice presided over by judges, who, during their terms of office, shall be independent, not only of the legislative and executive department, but independent of even the sovereign power of the people.

No state has been admitted having a recall provision in its constitution, and, thanks to the sturdy, judicial and fearless attitude of President Taft, the precedent has been set for the refusal by the national government to recognize either the wisdom or constitutionality of such a state constitutional provision. That some states have been driven or induced to adopt such a constitutional provision is no justification for similar action by other states. No republic of the modern civilized world had ever experienced even the proposition for the Judicial Recall, much less its adoption as a constitutional provision, until, within the past twenty years, its advocacy was started in Oregon, where it was adopted in 1908. Even the republics of Switzerland, the birthplace of modern direct popular government, have not failed to keep their judicial departments free from the effects of popular clamor. It was left to their disciple, Oregon, to adopt the precedent for modern times of this experiment of radicalism. And the experiment has not only failed, but within the four years of its existence, has demonstrated that it is a weak, inefficient, impracticable, vicious measure.

In no case has a state constitutional provision for judicial recall been upheld as not directly repugnant to this federal constitutional provision. There are reasons compelling the conclusion that, when such question shall arise before the federal court, it will not be left undetermined as being a mere political question. Whatever may be the ultimate methods of procedure by which the question shall be determined and the result of such determination enforced, the conclusion is manifest that the Judicial Recall, whether in the form commonly proposed for the Recall of Judges or for that of Judicial Decisions, is unrepugnant in its nature, that it involves a return to the tyranny of democracy, as illustrated in the rule of the demos of ancient Athens, and would be more fruitful of dangers and evils than a change which looked directly to the establishment of a monarchy.

### *A Waning Cause*

It is fortunate, perhaps, that local conditions in isolated localities, exciting the people of certain states to a spasmodic disregard

of fundamental principles, have induced sporadic instances of the formal adoption of the Judicial Recall, in the form of the Recall of Judges. Its adoption by Oregon alone was generally regarded as a local and temporary lapse from reason, and it was not until the example was followed by California and particularly by Arizona, that thinking people were awakened to the knowledge of the real dangers threatened by a fallacy once isolated but which subsequently was found spreading most insidiously and with great celerity. During the past twelve months, no subject has received such attention, whether in non-partisan discussions or in political debates. Its injection into politics is to be deprecated for it cannot from its very nature be properly an issue of national politics. So far as its practical scope is concerned, it is purely a question of state policy or state caprice. So far as the nation as a whole is concerned, it is a question of the science of government and of constitutional law. Comparatively few representative leaders and, almost without exception, none who are really schooled in the principles of jurisprudence, law and government, have been found among its advocates. On the contrary, from every bench and bar and associations of lawyers, from the whole membership of a learned profession entitled to authoritative expression of opinion on this question, have come deliberate protests against this greatest of modern fallacies. And not without results. The sturdy, fearless, statesmanlike action of President Taft in vetoing the Arizona statehood bill is bringing more and more comments of approval from even his political opponents. His reasons, as stated in his veto measure of August 15, 1911, and in his consistent opposition to the Judicial Recall since, have had most beneficial effect in demonstrating to the satisfaction of thinking people that the issue involved in the Judicial Recall is not one of politics, but one of a deliberate choice between a constitutional and an unconstitutional government, between a republican or constitutional democracy and a pure democracy unrestrained by safeguarding provisions essential not only to efficiency but also to permanence. The influence of all this opposition upon legislators, and upon the average citizen unskilled in the profession of law, is apparent. In April, 1911, the Minnesota house of representatives adopted the Recall of Judges by a large majority. At the special session in June, 1912, the same house, with its membership unchanged, expressly repudiated the Recall of Judges by an almost

unanimous vote. Its wisdom and practicability are now disputed or at least questioned by a large portion of its former adherents in the State of Oregon. The past year's campaign against this fallacy has been one of education. Hue and cry, sounding phrases and subtle *ad hominem* appeals to the voters as sovereign, however insidious, are met more and more with the spirit of sober reflection and by minds of a people who are now better informed and who are benefiting by the instructions they have received.

Its elimination as even a pretended issue of national politics is now fortunately assured. The personal views of President Taft, are too well known to require quotation; and the party, of which he is the representative head, is now before the people with the express statement in its platform that the Recall of Judges is regarded as "unnecessary and unwise" and declaring that:

The social and political structure of the United States rests upon the civil liberty of the individual; and for the protection of that liberty the people have wisely, in the national and state constitutions, put definite limitations upon themselves and upon their governmental officers and agencies. To enforce these limitations, to secure the orderly and coherent exercise of governmental powers and to protect the rights of even the humblest and least favored individual are the function of independent courts of justice. The republican party reaffirms its intention to uphold at all times the authority and integrity of the courts, both state and federal, and it will ever insist that their powers to enforce their process and to protect life, liberty and property shall be preserved inviolate. An orderly method is provided under our system of government by which the people may, when they choose, alter or amend the constitutional provisions which underlie that government. Until these constitutional provisions are so altered or amended, in orderly fashion, it is the duty of the courts to see to it that when challenged they are enforced.

The same platform recognizes that the remedies for existing evils properly lie with the legislative departments by means of further constitutional measures of reform in legal procedure and in provisions for the non-partisan selection of judges. In the words of the platform:

That the courts, both federal and state, may bear the heavy burden laid upon them to the complete satisfaction of public opinion, we favor legislation to prevent long delays and the tedious and costly appeals which have so often amounted to a denial of justice in civil cases and to a failure to protect the public at large in criminal cases.

Since the responsibility of the judiciary is so great, the standards of judicial action must be always and everywhere above suspicion and reproach. While

we regard the Recall of Judges as unnecessary and unwise, we favor such action as may be necessary to simplify the process by which any judge who is found to be derelict in his duty may be removed from office.

The eminent citizen selected as the representative head of the democratic party, Governor Woodrow Wilson, has recently stated his position on the Judicial Recall as follows:

The Recall of Judges is another matter. Judges are not law-makers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom is of the first consequence to the stability of the state. To apply to them the principle of the recall is to set up the idea that the determinations of what the law is must respond to popular impulse and to popular judgment. It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence by threat of recall those who merely interpret the law already established.

And his party now goes before the people urging, not disregard of law, but law reform through necessary and proper legislative measures. In the words of its platform:

We recognize the urgent need of reform in the administration of civil and criminal law in the United States, and we recommend the enactment of such legislation and the promotion of such measures as will rid the present legal system of the delays, expense and uncertainties incident to the system as now administered.

The fallacy of the recall, as applied to courts or to decisions of courts, is meeting its own inevitable self-defeat through the increased attention, which its advocacy has forced to the nature and functions of our constitutional government and to the real character, futility and dangers of any remedy, under whatever label it may be presented, containing the destructive ingredients of the Judicial Recall

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- "Do our Courts stand in the way of Social and Economic Justice?" Address by William J. Gaynor, Mayor of New York City, at Yale University, May 7, 1912.
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In *Case and Comment*, November, 1911, there are articles pro and con on the Initiative, Referendum and Recall by Senator Bourne, of Oregon; Representative Littleton, of New York; Governor Wilson, of New Jersey; Senator Root, of New York, and others.

See proceedings Minnesota State Bar Association August 19–21, 1912. President's address by Cordenio A. Severance of St. Paul, and debate on Judicial Recall by John Jenswold of Duluth, Lorin Cray of Mankato, F. B. Kellogg of St. Paul, Rome G. Brown of Minneapolis and others.

In the *Yale Law Journal* of June, 1912, is a discussion by Senator Owen in favor and Frederick N. Judson against.

In the report of the American Bar Association proceedings, 1912, there are several arguments against the Judicial Recall, among which are the following: Annual Address by Frank B. Kellogg; also report of Association's Committee to oppose the Judicial Recall; also address by Senator Sutherland of Utah and H. D. Estabrook of New York.

The following are other recent books on the subject:

"Documents on the State-wide Initiative, Referendum, and Recall," by Beard and Shultz. Macmillan, \$2.00 net.

"Government by All the People," by Wilcox. Macmillan, \$1.50 net.

"The Democratic Mistake," by Arthur G. Sedgwick. *Scribner's*, 1912.

"Majority Rule and the Judiciary: An Examination of Current Proposals for Constitutional Changes Affecting the Relation of the Courts to Legislation," by William L. Ransom, with an introduction by Theodore Roosevelt. *Scribner's*, 1912.





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# THE JUDICIAL RECALL A FALLACY REPUGNANT TO CONSTITUTIONAL GOVERNMENT

By

ROME G. BROWN

MINNEAPOLIS. MINN.

FROM "THE ANNALS," SEPTEMBER, 1912  
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# THE JUDICIAL RECALL—A FALLACY REPUGNANT TO CONSTITUTIONAL GOVERNMENT.

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By ROME G. BROWN.

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## FALLACIOUS METHODS OF ADVOCACY.

The other evening, on a city street corner, I was attracted by a hue and cry and by discordant notes emanating from a badly played violin in the hands of an up-to-date street faker around whom, drawn by the smoky glare reflected by an improvised torch and by the din of voice and fiddle, were gathering the passersby to listen to the "lecture," guaranteed free to everybody and to be followed by a most extraordinary "offer" for the benefit of all mankind. In high sounding phrases, smacking of all the medical learning from Æsculapius down to date, but with quotations from standard authorities garbled and distorted into perverted meanings, and with now and then a homely but subtle and insidious ad hominem appeal, the faker detailed most of the physical ills with which the human body is afflicted and alleged symptoms of this and that disease; and, having scared his hearers into a receptive mood, he launched forth with, as it seemed to their excited minds, bursts of eloquent and impassioned oratory. He represented the average human being as an object of piteous decrepitude or as the hopeless subject of degenerating tissues and death-dealing germs. His entire argument was a mass of unscientific exaggeration of known evils and of worse ones purely imaginary. He inveighed against all the medical learning of the day and against the expert knowledge and experience of those recognized as authority in the science of hygiene, medicine, and surgery. All learning and experience as shown from history were nothing. The wisdom of the fathers was merely tradition founded in error. What they had wrought out and handed down, the greatest discoveries and developments of the science of safeguarding human life and health which had brought the human race to the highest standard of scientific warfare with disease, were mere mockeries to the real truth. All of which, and more, was easily proved by the fact that the present systems of treatment were unavailing to eradicate disease, that men still continued to die and to suffer from ills which brought, and at all times threatened, incapacity and death.

Having thus demonstrated his major premise and at the same time all the other assumed elements of his syllogism, he reaches down and brings forth a little sealed box marked "The People's Own Cure—A Progressive Remedy," and asserts his assumed conclusion that this remedy, by its virtues, as demonstrated by its label,

is the final and only true solution of the problems of human illness. Incredulous as I had been, I seemed to become changed from merely a curious listener to a submissive patient. Temporarily, through a sort of mental indolence, the high-sounding, oft-repeated periods of the phrase maker had seemed almost to benumb my reason and to send me hopelessly groping after new means of self-protection, for which I was accustomed, in my saner moments, to rely upon a fund of knowledge slowly accumulated by careful study and experience. Healthy as I supposed I was beyond the average man of my age, I felt, for the first time, unusual dimness of vision, a weakness in my back, defects in my breathing, a numbness in my feet and limbs, and a new sensation of heart palpitation. How had that fool of a life insurance medical examiner recently passed me as sound? I had now a chance at least to make good; and it was only shortly before I came to myself that I, too, was reaching into my pocket to join the crowd in buying and partaking of this alluring "cure-all," thus suddenly and adroitly flashed upon them, without analysis and without any assurance of its nature or effects except as conveyed by its seductive label.

Not for the purpose merely of indulging in a figure of speech, not merely to reduce an answering argument to terms of ridicule, much less to exploit my sense of humor—on the contrary, as a carefully deliberated illustration of the methods commonly employed in advocating the measures of the judicial recall—I offer this example of the up-to-date nostrum vender. Like the advocates of those measures, he defies the experience of all history, he carps at all established institutions, pictures all progress as a delusion of stilted ignorance, and brands as "reactionary" all those who hesitate or refuse to attach themselves to his newly discovered panacea, brought now for the first time in modern history to public attention under the enticing title of a "progressive" remedy. No real diagnosis, no scientific study or consideration of the nature of the functions of the system to which it is to be applied, no scientific study of remedial agencies, no test or examination of the medicine, whether it be a compound or a single element, no deliberate consideration of the necessary or possible effects of its application—only a cry of pain and a jump in the dark—these are the characteristics of the methods employed by the exhorters for the judicial recall in presenting their vicious but seductive fallacy, a fallacy which is repugnant to constitutional government.

An examination of the considerations which have been urged for the judicial recall, whether it be the recall of judges or of judicial decisions, and whether made by an ex-President or by United States Senators, arrogating to their peculiar views the exclusive right to the title of "progressive," shows, without exception, the adoption of the street vendor's methods. They all dwell upon and exaggerate the existence of error, injustice, imperfections in the administration of justice or in the personnel of the judiciary, breathe distrust for existing conditions and disrespect for present institutions, and incite discontent among all the restless elements of the unthinking and the untaught; and thereby confront large masses of the people with their first lessons in constitutional government, administered in the form of demagogic tirades poured forth not only against our Federal and State Constitutions, but against any form of constitutional govern-

ment. At the very time of the greatest sensitiveness of public feeling, at a period most critical, because of the unsettled condition of public opinion on great political, economic, and social questions, these pretending teachers of the multitude, who, as citizens and as officeholders in various capacities, have sworn to support the Government of the United States and its Constitution, are insidiously filching from the minds of those taught in the principles of constitutional government and traducing to those yet untaught the fundamental and vital principles and axioms which are the very basis of our republican form of government. They distort precedent, misquote authority, and misrepresent the purposes for which our Government was framed. They replace justifiable feelings of contentment and prosperity with discontent and conviction of prevalent social and industrial injustice. They even extend their exaggeration of unnecessary evils to the highest fountain of justice that has ever existed under any human form of government, to that court which, under our Constitution, stands as the final protection against injustice, as to which court the humblest citizen of the land may feel that, as stated by our former minister to England, Edward J. Phelps:

If oppression and wrong should gain the ascendancy, and injustice stalk abroad in the land, and all else fail him, nevertheless his humblest roof, and all things that are sheltered beneath it, would find, somehow, someway, a final refuge and protection in the Supreme Court of the United States.

It is this court which Rufus Choate, in his speech before the constitutional convention in Massachusetts in 1853, presented to those who were crying for unrestrained and unlimited power of the people as the final bulwark of law and justice, guaranteed by our Constitution to every citizen—a court, as he said:

Appropriated to justice, to security, to reason, to restraint; where there is no respect of persons; where will is nothing and power is nothing and numbers are nothing, and all are equal and all secure before the law.

Without admitting the evils enumerated and assumed by the advocates of the judicial recall as a justification and final argument for their proposition, I would begin where they leave off. I would assume, for the purpose of argument, the existence of many of the evils which they relate. I would remind them that the best elements of the National and State bars are seriously and energetically working for practical reforms in legal procedure, in the manner of the selection of judges, and in the prevention of delays and against the miscarriage of justice, and this, too, by feasible and constitutional measures and by every constructive and really progressive method which can be devised; and that the fact that satisfactory remedies have not yet been attained, is not the fault of the bench or of the bar, whose leaders have for years been urging upon the people, through the legislatures, fully formulated and efficient remedial measures. The fault lies with the people themselves, whose direct representatives in the legislatures, National and State, refuse properly to consider and act upon proposed laws of authenticated and undeniable efficacy. The failure or absence of remedy in no degree constitutes a justification for the application of the drastic and suicidal measures involved in the judicial recall.

Contrary to the methods of the recall advocates, let us bring ourselves back, first, to a consideration of the nature and functions of the system to which this untried specific has been prescribed. Then



let us examine the real character of the proposed remedy itself. By no other method can its desirability or its efficacy be determined. By no such method has it ever been presented by its advocates. It will appear that the proposition of the judicial recall, whether in the form of the recall of judges or of judicial decisions, is not one of remedy for existing evils, but is an attack upon constitutional government itself; for it strikes at the very keystone upon the stability of which depends our present form, or any form, of constitutional government.

### THE NATURE AND FUNCTIONS OF OUR CONSTITUTIONAL GOVERNMENT.

To discuss comprehensively the questions involved would be to repeat and enlarge upon great constitutional authorities who have presented in general and in detail the growth, nature, and extent of constitutional functions, including those of the judiciary. In brief outline let us here recall some great demonstrated truths as we examine the fallacies of the advocates of the judicial recall in the assumptions which they make as to the nature and functions of our constitutional form of government.

### THE FALLACY OF DISREGARDING HUMAN FALLIBILITY.

The first and most inexcusable fallacy is the assumption that the existence of evils, political, economic, or judicial, arising in connection with this or that department of Government is necessarily an indictment of the administration of the Government, of the particular department in connection with which the evils are found to exist, or of the Government itself. Such assumption disregards the ever-present and irremediable element of human imperfection. It is not and never can be within the power of man, at any stage of civilization, to establish, maintain, and administer any institution, governmental, sociological, industrial, or otherwise, free or even substantially free from incidental oppression, injustice, and inequality, or from sacrifice, to some degree, of natural and theoretical rights of person and of property. The crudest social compact involves, to a greater or less extent, sacrifice. The most perfect form of government must involve the same sort of sacrifice and, with its human element, also many evils, both those avoidable and those unavoidable, evils which in their concrete application instance injustice, inequality, and even oppression. The merits of any particular form of government or of its administration, therefore, are not decided by the fact of the existence or nonexistence of this or that evil, nor from the presence or absence of this or that instance of injustice, inequality, or oppression. The question is, In view of the experience of mankind as known by the history of governments, what form and what provisions of fundamental law will in the end most tend to diminish the classes or instances of evil? Under what system may the natural evolutionary processes of change, by the guidance of intelligent efforts for reform and progress, best and furthest work out in the direction of universal freedom, equality, and justice?

The fathers of our Constitution did not predict or expect a perfect government free from the results of human error in its administra-

tion. The Constitution was established not with the expectation of forming a "perfect" union, but a "more perfect" union, and to establish—not finally and without exceptional failure, but in general, so far as human foresight and experience could provide—justice, domestic tranquillity, means of common defense, the blessings of liberty to ourselves and posterity, and to provide the best means for working out, with all the vicissitudes of success and failure, those blessings of liberty. Its object was to establish a government which should in the long run, all things considered, be most conducive to "promote the general welfare" of the people who should live under it.

That the accomplishment of these purposes is best assured by our Constitution is taught by the science of government, by experience, and by authority. Gladstone characterized our Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." No change in the essential form of government, no fundamental constitutional change, can be justified on the plea of the existence of unremedied or even irremediable evils. As expressed in the words of Lincoln:

Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories, and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step while there is any possibility that any portion of the ills you fly from have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from—will you risk the commission of so fearful a mistake?

Appeals to popular prejudice inducing unrest and discontent at existing evils should be met with distrust. Clamors for the "rights" of the people should be checked with a steadfast but more altruistic regard for the preservation of the Constitution which was expressly established to safeguard those rights. There should be kept in mind the warning of Hamilton when he said:

A dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has found a much more certain road to the introduction to despotism than the latter, and that of those men who have overturned the liberties of republics the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants.

#### THE FALLACY OF PURE DEMOCRACY.

The fundamental fallacy of the judicial recall is the assumption that the object of our form of government and the goal toward which its administration should work are the establishment and promotion of a government directly by the people, in which the will of the majority, as expressed at the polls, should at all times receive the nearest possible immediate response through the machinery of the different departments by which the powers of government are administered. The assumption is, not merely that ours was to be a government generally democratic in form and in essence, but that in fact it was intended to be one of pure democracy; and that any substantial check or restraint upon the responsiveness by governmental departments to the will of the people expressed through their majorities from time to time are, when shown by experience to be real checks

and hindrances, imperfections, the immediate or gradual elimination of which should be the chief object of any reform movement which is entitled to be denominated "progressive." It is the presentation of this fallacy, regarding the fundamental object of our system of government, to the individual voter, whom this fallacy places upon a pedestal, as the direct representative of the democratic idea of "sovereignty" and whose sovereign rights the same fallacy has assumed to have been usurped—it is this fallacy which is the root of all the misinformation, misunderstanding, deceit, and illusion which have given the judicial recall its seeming popularity. Its falsity, however, is demonstrated by even the most superficial consideration of the nature and character of our form of government, of the functions of its different departments, and of the objects and efficiency of our Constitution.

Our Government is a democracy, but it is a constitutional democracy, and the very object of the constitutional feature is to place in the way of the sovereign people those limitations, checks, and balances which, while not preventing enforcement of the will of the sovereign people, should insure the wise and deliberate exercise only of wise and deliberate, and therefore properly restrained, sovereign authority. Its primary object was to prevent the immediate enforcement of the unrestrained, unchecked, and unlimited will of the majority, whether expressed at the polls or otherwise. Sovereignty invested in a single person or in a few, passing, without consideration of other distinctions, by inheritance, checked only by promises of respect for individual rights—promises wrested from the sovereignty by force of arms, as were those of our Bill of Rights from King John at Runnymede; rights, however, vouchsafed only by ties of tradition or by precedent—constituted the tyranny of monarchy, the evils and abuses of which, fresh in the minds of our Constitution makers, rendered it abhorrent to them.

But, learned in the history of nations and conscious of the fate of States subjected to the unrestrained will of the people, they saw another danger to be avoided, greater than that of the tyranny of monarchy. Our Government must insure to its people not only the blessings of liberty, not only the natural right of dominance by the people as sovereign, but it must safeguard forever those blessings and rights by a form of government adapted to that purpose and the stability of which should, as far as human intelligence could provide, be made certain against the self-destructive elements inevitably accompanied by an absence of proper checks, limitations, and balances, upon even the sovereign power of the people. They were not satisfied to leave such checks and limitations to rest upon precedent and to be presented by analogy or implication from the recorded history of events. They must be expressed and recorded as the supreme law of the Nation, paramount to the will of the sovereign power and to the will of its representative governmental departments. In their wisdom they saw in this express and written, fundamental and paramount law the only sure and safe protection against the dangers of the tyranny of democracy.

Recognizing the fact that, with further industrial, economical, and social development, the fundamental law thus established might not be sufficiently elastic for the necessary adaptation, they provided for amendment by a method, slow, but not cumbersome, as facile

and speedy as could be consistent with deliberate and well-considered action, and therefore with the necessary safeguards against the results of caprice, temporary passion, or prejudice. While exercising the greatest wisdom of their times, they bowed wisely and consistently to the wisdom of future generations, but only to a wisdom which reaches and acts upon sound judgment, as their judgments were then pronounced, after dispassionate contemplation, deliberation, and discussion of facts, theory, and precedent.

The Government established is a government "by the people." It is the nearest to a government by majorities that can be established consistent with the necessary elements of stability and the safeguarding against tyranny, which safeguards can only be retained by the constitutional checks and limitations upon the exercise of the sovereign authority and of the powers of its representative departments in the Government. Any measure which, like the judicial recall, ignores these safeguards or their necessity is subversive.

Daniel Webster said in 1848:

Whoever says or speaks as if he thought that anybody looks to any other source of political power in this country than the people must have a strong and wild imagination, for he sees nothing but the creations of his own fancy. He stares at phantoms. Let all admit what none deny, that the only source of political power in this country is the people. Let us admit that they are sovereign, for they are so; that is to say, the aggregate community, the collected will of the people, is sovereign.

Abraham Lincoln said:

A majority held in restraint by constitutional checks and limitations, always changing easily with deliberate changes of popular opinion and sentiment, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or despotism.

Quoting these words from Lincoln, Senator Elihu Root at the recent Chicago convention said:

That covenant (the Bill of Rights) between power and weakness is the chief basis of American prosperity, American progress, and American liberty. \* \* \*

We know that there is no safe course in the life of men or of nations except to establish and to follow declared principles of conduct. There is a divine principle of justice which men can not make or unmake, which is above all governments, above all legislation, above all majorities. The limitations upon arbitrary power, and the prohibitions of the Bill of Rights which protect liberty and insure justice, can not be enforced except through the determinations of an independent and courageous judiciary. \* \* \*

So the three departments, the executive, legislative, and judicial, were established, each separate from and independent of the others. No changing whim of the people could, even in two years, change the entire legislative representation, for the Senate could not be entirely changed except after six years. It vested in the legislative department certain specified powers and expressly prohibited the exercise of other powers by either the Federal or the State Governments, expressly reserving to the States respectively, or to the people, all powers not so expressly delegated to the United States nor prohibited to the States. In order to avoid the oppression of the tyranny of undeliberate or capricious actions by the sovereign people, it was directly and expressly provided in section 9, Article I, against the suspending of the privilege of the writ of habeas corpus and the passing of bills of attainder or ex post facto laws, against the levying of disproportionate taxes and of duties upon articles exported between these States; prohibiting any State from enforcing any law impairing the obligation of contracts and from levying any impost or duty.

And, later by amendments, the same supreme law prohibited the Congress from interfering with the establishment and free exercise of religion, with freedom of speech, and of the press, or the right of people peaceably to assemble and to petition for redress of grievances; against the quartering of soldiers in any house without the consent of the owner, the violation of the security of person and property against unreasonable searches and seizures without warrants properly verified and issued, depriving any person of his life, liberty, or property without due process of law, and the taking of private property for public use without compensation; and insuring the right of trial by a jury for criminal prosecutions and the protection of the accused against arbitrary and illegal punishment, the prohibition of excess bail, of excessive fines and cruel punishments; the prohibition of slavery or involuntary servitude at any place within the jurisdiction of the United States; and further prohibiting any State from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of his life, liberty, or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the law; and prohibiting either the United States or any State from denying or abridging the rights of citizens on account of race, color, or previous condition of servitude.

Read and consider these limitations, take any one of them, and as an individual, ask yourself seriously the question whether you, yourself, from considerations of your own selfish interest, would willingly and deliberately hazard the risk of giving up forever the safeguard to your life and liberty expressly vouchsafed by the protective provisions thus established as the law of the land, which no legislature and which no majority of the people may ever capriciously set aside. If you happen to feel no selfish need of such protection, then consider the question as one touching your own posterity, or as one concerning the entire citizenship of this Republic and those who shall come after them, and at the same time concerning the very integrity of the Government under which you and yours, and they and theirs, are to live. Not until you have brought yourself to the conclusion that, not merely one or a few of such limitations, but each and all of them, without exception, are unnecessary and unwise, and that they, each and all, may at any time be disregarded—not until then can you be a consistent supporter of the judicial recall. These are questions which are, as is the question here under consideration, finally answered in only one way by any citizen who has calmly considered all the facts pertaining to the issue and whose conclusion is the result of cool, deliberate, and impartial judgment.

These are some of the limitations placed upon the legislative powers of the people in the Federal Constitution, as similar limitations have been placed in all State constitutions, for the very reason that the judgment and discretion of the people could not at all times, and without restraint and limitations, be relied upon, especially in times of agitation and in times of political or economic crisis. The necessary safeguards could be insured only by these express limitations upon the power of the sovereign people to legislate, and upon the privilege of the people to have legislation enforced.

The functions, powers, and duties of the executive department and of its members were set forth and limited by express provisions.



By the same constitution, as by similar provisions in all State constitutions, there was also established a third department of government, the judicial, with certain express original jurisdiction and with such appellate jurisdiction, both as to law and fact, as should be provided by the legislative department. And by the same instrument it was provided (Art. VI) that:

This Constitution \* \* \* shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

And finally, it was expressly provided (Art. VI) that:

The Senators and Representatives before mentioned, and the members of the several State legislatures and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution.

Such are the nature, purpose, and effect of the provisions defining the functions of our constitutional government; and it is in respect to these and similar provisions that it differs upon the one hand from a monarchy and upon the other hand from a pure democracy. While it is a government by the people, it is a government of checks upon the unrestrained exercise of sovereign authority. Its making was the freest possible from any passion or prejudice. In the words of Jay:

Men who possessed the confidence of the people, and many of whom had become highly distinguished for their patriotism, virtue, and wisdom in times which tried the minds and hearts of men, undertook the arduous task in the mild season of peace, with minds unoccupied with other subjects. They passed many months in cool, uninterrupted, and daily consultation, and finally, without having been awed by power or influenced by any passions except for love of their country, they presented and recommended to the people the plan produced by their joint and very unanimous councils.

Their combined learning in the science of government has not been equaled by any body of men ever assembled for the same or a similar purpose. As expressed by Hamilton:

If it had been found impossible to have devised models of a more perfect structure than the enlightened friends of liberty would have been obliged to have abandoned that specie of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood which were either not known or imperfectly known to the ancients. The distributions of powers into distinct departments, the introduction of legislative balances and checks, the institution of courts holding their offices during good behavior, the representation of the people in the legislatures, by deputies of their own election—these are wholly new discoveries, or have made their principal progress toward perfection in modern times. They are the means and power by which the excellencies of representative government may be retained, and its imperfections lessened or avoided. \* \* \*

They heeded and applied the warnings of authority and of experience. The details of their structure varied from the ideal only in so far as hard experience and wise precept showed to them the necessity of restraining safeguards in order to insure practicability and stability.

Aristotle, nearly four centuries before the Christian era, said:

One species of democracy is where the public offices are open to every citizen and the law is supreme. Another species of democracy is where the public offices are open to every citizen, but where the people and not the law is supreme. The latter state of things occurs when the government is administered by psephismata (by popular vote) and not according to laws, and it is produced by the influence of the demagogues. \* \* \* But where the laws are not supreme, demagogues arise; for the people become as it were a compound monarch, each individual being only invested with power as a member of the sovereign body; and a people of this sort, as if they were

a monarch, seek to exercise a monarchical power in order that they may not be governed by the law, and they assume the character of a despot; wherefore flatterers are in honor with them. A democracy of this sort is analogous to a tyranny (or despotism among monarchies). Thus the character of the government is the same in both, and both tyrannize over the superior classes, and psephismata are in the democracy what special ordinances are in the despotism. Moreover, the demagogue in the democracy corresponds to the flatterer (or courtier) of the despot; and each of these classes of persons is the most powerful under their respective governments. It is to be remarked that the demagogues are, by referring everything to the people, the cause of the government being administered by psephismata, and not according to laws, since their power is increased by an increase of the power of the people, whose opinions they command. The demagogues likewise attack the magistrates, and say that the people ought to decide and since the people willingly accept the decision, the power of all the magistrates is destroyed. Accordingly, it seems to have been justly said that a democracy of this sort is not entitled to the name of a constitution, for where the laws are not supreme there is no constitution. In order that there should be a constitution, it is necessary that the government should be administered according to the laws, and that the magistrates and constituted authorities should decide in the individual cases respecting the application of them.

Burke, in his reflections on the French Revolution, said:

Until now we have seen no example of considerable democracies. The ancients were better acquainted with them. Not being wholly unread in the authors who have seen the most of these constitutions, and who best understood them, I can not help concurring with their opinion that the absolute democracy, no more than the absolute monarchy, is to be reckoned among the legitimate forms of government.

Webster in his speech on the Rhode Island government said:

The people can not act daily as the people. They must establish a government and invest it with as much of sovereign power as the case requires. \* \* \* The exercise of legislative power and the other powers of government immediately by the people themselves is impracticable. They must be exercised by representatives of the people, and what distinguishes the American Government as much as anything else from any government of ancient or modern times is the marvelous felicity of the representative system. \* \* \* The power is with the people, but they can not exercise it in masses or per capita. They can only exercise it by their representatives. \* \* \* It is one of the principles of the American system that the people limit their governments, National and State. It is another principle, equally true and certain and equally important, that the people often limit themselves. They set bounds to their own powers. They have chosen to secure the institutions which they established against the sudden impulse of mere majorities. All our institutions teem with instances of this. It was this great conservative principle in constituting forms of government, that they should secure what they had established against hasty changes by simple majorities. \* \* \* It is one remarkable instance of the enactment and application of that great American principle that the constitution of government should be cautiously and prudently interfered with, and that changes should not ordinarily be begun and carried through by bare majorities. \* \* \* We are not to take the will of the people from public meetings, nor from public assemblies, by which the timid are terrified and the prudent are alarmed, and by which society is disturbed. These are not American modes of securing the will of the people, and never were.

Washington recognized the impracticability of a pure democracy and of the necessity in any form of government of restraint upon the exercise of the will of majorities. "It is on great occasions only," he said. "and after time has been given for counsel and deliberate reflection, that the real voice of the people can be known." And the following are also his words:

Republicanism is not the phantom of a deluded imagination. On the contrary, laws under no form of government are better supported, liberty and property better secured, or happiness more effectually dispensed to mankind. \* \* \* If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment, in the way which the Constitution designates. But let there be no change by usurpation; for, though this in one instance may be the instrument of good, it is the customary weapon by which governments are destroyed. The precedent must always greatly overbalance in per-

manent evil any partial or transient benefit which the use can at any time can yield. \* \* \* Toward the preservation of your Government and the permanency of your present happy state it is requisite not only that you steadily discountenance irregular opposition to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what can not be directly overthrown. \* \* \* This Government, this offspring of our choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures are duties enjoined by the fundamental maxims of liberty. \* \* \* The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the constitution which at any time exists, till changed by the explicit and authentic act of the whole people, is sacredly obligatory upon all.

Madison said in the Federalist:

A pure democracy can admit of no cure for the mischiefs of factions. A common passion of interest will in almost every case be felt by a majority of the whole. A communication and concert result from the form of government itself, and there is nothing to check the inducement to sacrifice the weaker party or any obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence. Their conditions have ever been found incompatible with personal security or the rights of property, and have in general been short in their lives as they have been violent in their deaths. Theoretical politicians who have patronized this species of government have erroneously supposed that by reducing mankind to a perfect equality in their political rights they would at the same time be perfectly equalized and assimilated in their possessions and opinions and their passions.

Lecky, in his Democracy and Liberty, says:

One thing is absolutely essential to its safe working, namely, a written constitution securing property and contracts; placing difficulties in the way of organic change; restricting the power of the majorities; and preventing outbursts of mere temporary discontent and mere casual conditions from overturning the main pillars of the state.

Mill, in his essay on "Government," says:

In this great discovery of modern times the system of representation, the solution of all the difficulties, both speculative and practical, will perhaps be found. If it can not, we seem to be forced upon the extraordinary conclusion that popular government is impossible. \* \* \* The community can act only when assembled, and when assembled it is incapable of acting. The community, however, can choose representatives.

Tucker, in his work on the Constitution, says:

Representation is the modern method by which the will of a great multitude may express itself through an elected body of men for deliberation in lawmaking. It is the only practicable way by which a large country can give expression to its will in deliberate legislation. Give suffrage to the people; let lawmaking be in the hands of their representatives; and make the representatives responsible at short periods to the popular judgment, and the rights of men will be safe, for they will select only such as will protect their rights and dismiss those who upon trial will not. \* \* \* The government of the numerical majority is the mechanism of brute force.

The Federal Supreme Court, speaking through Chief Justice Fuller, after quoting from Webster's argument in the Rhode Island case, said in the case of *In re Duncan* (139 U. S. 449. 461):

By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.



Senator Henry Cabot Lodge, in his recent address, "The Constitution and its makers," says:

The destruction of an independent judiciary carries with it everything else, but it only illustrates sharply the general theory pursued by the makers of the Constitution. They established a democracy, and they believed that a democracy would be successful, but they also believed that it could succeed solely through forms and methods which would not make it impossible for the people to carry on their own government. For this reason it was that they provided against hasty action, guarded against passion and excitement, gave ample room for the cooler second thought, and arranged that the popular will should be expressed through representative and deliberate assemblies and the laws administered and interpreted through independent courts. Those who would destroy their work talk continually about trusting the people and obeying the people's will. But this is not what they seek. The statement as they make it is utterly misleading. \* \* \* The framers of the Constitution made it in the name and for the benefit of the people of the United States; for the entire people, not for any fraction or class of the people. They did not make the Constitution for the voters of the United States. They recognized that the popular will could only be expressed by those who voted and that the expression of the majority must in the end be final. But they restrained and made deliberate the action of the voters by the limitations placed upon the legislative, the executive, and the judicial branches, so that the rights of all the people might be guarded and protected against ill-considered action on the part of those who vote. Those who now seek to alter the fundamental principles of the Constitution start with a confusion of terms and a false proposition.

These are some of the considerations by which is demonstrated the fallacy of pure democracy, or the fallacy of direct adjudication of constitutional questions by popular vote.

#### THE FALLACY OF JUDICIAL USURPATION.

Another distinct but in many respects correlated fallacy indulged in by the advocates of the judicial recall is in respect to the nature and propriety of the powers of the judiciary. Where the evident functions of the court are admitted, their exercise even within constitutional limits, is criticized as unwarranted and arbitrary; and the very existence of such powers is made the object of denunciation. From such proceed an excoriation of the constitutionally established powers of the judiciary and a demand that by the indirect method of the recall of judges or by the more direct method of the recall of judicial decisions, the protective and safeguarding restraints and limitations upon the immediate and direct enforcement of the will of the majority be made ineffective. Ex-President Roosevelt in an editorial in the Outlook of March 9, 1912, denounced our system of restraint by express limitations and held up as exceptional and unnecessary the admitted power of the judiciary, in this country, to decide between the logical requirements of a written constitution and the seeming requirements of a statute passed ostensibly for the purpose of improving social or economic conditions. He said:

I speak purely of the kind of decisions which only American courts are entitled to make, the kind of decision which no judge in our neighbor Canada, in Australia, in England, in Germany, or in France has the right to make, or would for one moment be permitted to make—I am speaking of the action of the court of a State when it declares that a law passed in the collective interests of the whole community is unconstitutional.

The less shrewd, the more ingenuous and frank advocate, the typical advocate, of the judicial recall carries his fallacy to the extent of an assumption and express statement that the courts, having originally been established as a useful, if not necessary, department of government, have actually usurped powers and functions in no

wise originally intended for them; that they have arbitrarily and without constitutional warrant arrogated to themselves a sort of final despotism, inconsistent with all proper theories of our form of government, and have asserted by gradual usurpation a sort of sovereignty of their own at war with the real sovereignty of the people. It is by such usurpation, it is claimed, that the courts now exercise the power to declare invalid and unenforceable statutes found repugnant to constitutional provisions. It is asserted that these usurped powers should be taken away by other, and, as it is said, perhaps similar arbitrary methods defying all constitutional considerations; so that thus there may be recovered to the people themselves the powers which have been insidiously but wrongfully wrested from them. This fallacy persists, from the covert misleading attacks made upon our constitution through comparison with unconstitutional systems of monarchy or democracy, systems impossible for us, to the open, unqualified denunciation of our entire system of government and of its Constitution, and the open charge, as the basis of the argument for the judicial recall, that the judiciary have stolen, by gradual unconstitutional encroachment and usurpation, the real sovereignty which was intended to rest at all times and under all circumstances directly with the people. Such is the vice of the insidious and misleading appeal to the voter, made by the self-seeker for notoriety or for office, who pretends to teach his hearers that government "by the people" means, not our form of government as administered under the Constitution, but another and different system of government; or that it means our system, so far as mere matter of form is concerned, but administered in such a way that its essence shall be lost and only the mere form left, fragile and responsive, without limit and without delay, to the changing demands of the people, as expressed from time to time by their majority vote. Such is the vice of the cry that the Constitution and the law must not be greater than their makers; that judges are merely the servants of the people; that the people made the fundamental law and that they make the statutes and that their last expressed will, as represented by a temporary majority, should be directly enforceable as a law paramount to all others.

Let us, who as citizens have sworn to support our Constitution and our Government and laws under that Constitution, and who, respecting our oaths, insist that changes in government, or in the administration thereof, shall be brought about only through constitutional methods, consider for a moment the constitutional functions of the judiciary and the necessity of the preservation of these functions, and particularly of its independence.

The necessity of constitutional limitations as essential to the efficiency and stability of our form of Government has been shown. But these limitations and restraints could not be enforced, except through a judicial department, and it was for that purpose primarily that the judicial department was established. It was upon the courts under our system of government that the only ultimate reliance could be placed to safeguard and enforce the constitutional limitations expressly placed upon the sovereign power of the people. It was expressly made the duty of the Federal and of the State courts to observe this fundamental law as the supreme law of the land; this is the duty which has been performed by the Federal and State courts,

and it is by the performance of this function that our constitutional Government has been preserved. This duty included the power of the courts to declare invalid any statute if repugnant to constitutional provisions. That this duty and power were originally imposed upon the courts as an essential feature of the new form of government and is in no degree a usurpation or afterthought is shown by the fact that the deliberations of the constitutional convention at all times assumed such power to be intended for the judiciary. That it was so understood by the several States in ratifying the Constitution is shown by the fact that the existence of this very power in the judiciary was everywhere urged upon the States as the great safeguarding provision which, as against all the timorous feeling of uncertainty, should make them assured of the safety and efficiency of the new Constitution and act as a compelling reason for its unanimous adoption. Ellsworth, on January 7, 1788, urging the ratification of the Constitution upon the Connecticut convention, said:

If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is a usurpation upon the Federal Government, the law is void; and upright independent judges will declare it so.

So at the same period Hamilton was urging in the *Federalist*:

There is no liberty where the power of judging be not separate from the legislative and executive power. \* \* \* The complete independence of the courts of justice is peculiarly essential in a limited constitution. \* \* \* Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the Constitution void.

So Chief Justice Marshall, in the case of *Marbury v. Madison* (1 Cranch, 368, 388), summarizes the constitutional provisions including those making it the supreme law of the land and binding upon all courts, Federal and State, and requiring all judges to swear to its support and the requirement by the yet sovereign people, through their legislatures, of an oath by every judge that he "will faithfully and impartially discharge" all the duties incumbent upon him according to the best of his abilities and understanding, "agreeably to the Constitution and laws of the United States"; and he demonstrates that the power and duty of the courts to declare invalid unconstitutional statutes are imposed not only by necessary implication but by express provision. He said:

This original and supreme will [the people] organizes the Government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

The Government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested [either] that the Constitution controls any legislative act repugnant to it or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with

ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

#### A SIGNIFICANT EXAMPLE OF FALLACIOUS STATEMENT.

Ex-President Roosevelt cites Australia as a country where the powers of the courts, as exercised in the United States, find no parallel. As pointed out by Justice Burch of the Kansas Supreme Court in a recent address, it is the instance of Australia which shows a deliberate adoption of our constitutional methods and of the very powers of the judiciary which are now widely made the subject of denunciation. As late as January, 1901, upon the address of all the Australian colonies to the British Crown, there was put into effect, for the government of the people of the entire Australian continent, a written constitution modeled upon that of the United States of America.

For five years representatives of the colonies had discussed with the greatest learning and research the merits and demerits of different forms of government as shown by the experience of parliamentary systems of government and of that of the United States and other countries, with the result that the American precedent became the guide and model of a new continental government. It followed closely, in many respects, the American model in its separations of federal and State authority, and in its division of power between the three separate and independent legislative, executive, and judicial departments, and, what is more important, with a federal judiciary as the supreme interpreter of the Constitution and with the Constitution as the supreme law of the land. And for 10 years prior to the time when ex-President Roosevelt was claiming a repudiation by Australia and other nations of the world of the power of the judiciary to prevent enforcement of a legislative statute as repugnant to the supreme written law of the land, the courts of the Commonwealth of Australia had, following the precedent of decisions of the Supreme Court of the United States, been declaring numerous statutes, even some affecting human rights from a vital standpoint, "ultra vires;" that is, unconstitutional. Such decisions included those declaring invalid the federal act establishing a worker's mark, passed in the interests of union labor, as an invasion of the separate powers of a State over domestic commerce and industry; a federal act attempting to control disputes between employer and employee on State railways; and an excise tariff act by which it was attempted indirectly to secure to workmen a share of the profits accruing to employers from protection taxes.

Another incident which has been overlooked by the chief American advocate of the recall of judicial decisions is that the measure of the appeal to the people from the decisions of the courts on constitutional questions was, over a decade ago, presented to the Australian constitutional convention, and although fully debated, received no substantial support except from the member proposing it and was finally withdrawn. It was unanimously agreed that this indirect method of amending or modifying the constitution was inconsistent with the



form of government proposed, which gave ample opportunity for all proper amendment by methods requiring deliberate action.

This recent well-considered approval, by an exceptionally intelligent and progressive people of an entire continent, of our constitutional system, now denounced to the American people by an American of world-wide reputation, is a most significant, though silent, answer to the advocates of the judicial recall fallacy.

#### THE PROPOSED REMEDY OF JUDICIAL RECALL ANALYZED.

In less strenuous times it would seem almost puerile to detail, even to the extent of the above statement, the nature and functions of our Government and of its judicial department. The necessity of doing so now only illustrates the truth of the maxim that it is necessary now and then to get back to first principles. It is the first principles of government which are ignored by the advocates of the judicial recall. Our Government is not one of pure democracy, but is a republican or constitutional democracy. It is a Government not directly by majorities, whose changing whims shall be enforced directly and immediately from time to time as people may be affected by passion or prejudice. It is one where for self-protection, for the protection of each constituent member of its citizenship, there are self-imposed general rules of conduct, general limitations of powers upon the Federal and upon the State legislatures. It is a Government by a majority, but by a majority acting through representatives and at the same time restricted within express limits, limits which are unchangeable except through deliberate, well-considered action.

These restrictions and limitations are the supreme law of the land and it is the express duty of the courts to enforce their observance. The primary function of the courts is to stand between temporary demands of a majority and the oppression and injustice which must, or at least may, follow unrestrained power. For the preservation of this safeguarding element the independence of the judiciary is essential. It must not be cringing or subservient to a majority. Its judges must be the "servants" of the people only in the sense that, for the people, they carry out fearlessly, impartially, and judicially the duties which are imposed upon them. Any measure which strikes at their independence strikes at the very foundation of the judicial department and at the very foundation of our Government itself.

In order properly to perform these functions the element of independence is absolutely essential. Without the quality of absolute independence the judicial department becomes a mere reflector of public opinion, constantly changing with the temporary whims, passions, and prejudices of the majority.

It was the better to preserve the independence of the judiciary that the tenure of office during good behavior was advocated and adopted. Eighty-seven years before the adoption of our Constitution the King of England had the arbitrary power of unseating a judge; but that power was taken away by the act of settlement, which secured to the judges their tenure of office during good behavior, subject only to impeachment by Parliament. In so much did the act of settlement make the Government of England take on a feature republican in form, for the power of removal of judges was given to the representatives of the people, not to the people themselves.

directly, but to the Parliament which was given the duty to hear, try, and determine, and which was a body so constituted that it could perform that function.

So, in advocating the constitution and the good-behavior tenure, Hamilton said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this all the reservation of particular rights or privileges would amount to nothing.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjectures sometimes disseminate among the people themselves and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the government and serious oppressions of the minor party in the community.

Upon the whole there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial officers in point of duration; and that, so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

In order to avoid the danger of subserviency by reason of short-term elections, the Massachusetts constitution, as late as 1870, provided for tenure of office for judges during good behavior, subject to removal by impeachment. As stated in that constitution:

It is essential to the preservation of the rights of every individual, his life, liberty, property, character, and that there be an impartial interpretation of the laws and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is therefore not only the best policy but for the security of the rights of the people and of every citizen that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well.

It necessarily follows that any measure of reform is obnoxious and unwise in so far as it is antagonistic to these basic principles of our form of government. Any measure which is directly repugnant to these principles is not only inexpedient, but absolutely indefensible. Such is the character of the judicial recall, whether proposed in the form of the recall of judges or of judicial decisions. The judicial recall is not remedial, but baneful in its nature. It is not either constructive or progressive, but is destructive and reactionary. This is true whether viewed from a mere theoretical statement of its elements or from the concrete instances of its attempted application. It means a replacement of a properly adjusted, stable, practicable, successful, constitutional government with a form of government shorn of constitutional protective features. It directs all the forces of reform into a downward path leading to further elimination of the very rudiments of our republican system. It would establish the precedent of the yielding up of fundamental principles to the temporary pressure of elements of unrest, instead of insisting upon a constructive adjustment consistently and scientifically worked out in such a way as to save to the American people these protective features of our form of government which distinguish it from despotism upon the one hand, and from disorder, socialism, and anarchy upon the other.

## THE RECALL OF JUDGES.

The recall of judges has, by the very terms in which it is usually expressed and presented, a certain allurements which blinds the superficial observer to its essential vices. Like the recall of judicial decisions, it is founded on the fallacy of human infallibility, on the fallacy of a sort of divine right belonging to the people to have the sovereign authority, ultimately imposed in them, exercised directly upon the command of a majority, and, finally, upon the fallacy that the power exercised by the courts to invalidate unconstitutional statutes, because it operates as a check upon the direct exercise of the people's sovereignty, is, for that reason, an obstacle and a menace and is a power attained by usurpation. From such origin has the recall of judges arisen and is now put forward as the remedy and solution of all the evils complained of. Its impracticability is demonstrated by theory and by experience.

As applied in Oregon, and with some modifications in other States, the recall of judges means that a judge may sit secure for the first six months of his office, and that, if at any time thereafter, for any reason, or without reason, 25 per cent of the voters of his district file a petition demanding his recall, stating in such petition in any manner they choose the complaint which they have against him in not to exceed 200 words, which limited charge shall be placed upon a ballot at an election upon short notice, then the judge, if he does not resign, must go to the polls with the privilege of having placed upon the same ballot his defense in not to exceed 200 words, and must stand for election against other candidates selected by his opponents, and that, upon such manner of charge and defense, the voters of his district shall decide whether he shall be retained upon the bench or an opposing candidate be put in his place.

The mere statement of the provisions for the recall is sufficient to condemn such a measure, not only as repugnant to the proper administration of justice, but as a serious injection into our system of government of a travesty upon justice.

## A SUMMARY, ARBITRARY, AND UNRESTRAINED POWER.

It is not necessary to defend other methods of removal of judges nor to discuss reform measures by which the method of removal by impeachment may be made more efficient. The removal by address of the legislature or by impeachment involves the constitutional elements of a notice to the accused, an opportunity for hearing, a hearing upon the facts and upon the law, and an adjudication in accordance with the fundamental constitutional principles protecting the rights of every person accused of an offense. The recall is not only devoid of all of these constitutional elements, but involves all the vices against which these fundamental protective features were intended. Even if the causes for recall were expressly confined to misfeasance and malfeasance, and even if specific charges should be required, how could it be possible for a proper or sufficient notice to be given to the accused in the limited space of 200 words?

Suppose the charge be one of incorrectness in a decision involving questions of fact and law, how could a defense to such a charge be made in the same limited space? And, even if issues of fact and law

were sufficiently framed, what guaranty is there that any of the adjudicators—that is, the voters—who finally pass upon the issues, shall consider these or any issues? The result must be that the very bringing of an indictment by the filing of a recall petition shall be taken by a large number, and perhaps by a majority, as of itself sufficient proof that a change is desirable. There can be no hearing except by public clamor and upon statements, however false, which are spread broadcast by newspaper and by pamphlet and by rumor, without the slightest pretense of verification even by any form of oath. At the very best it involves a “trial” upon mere hue and cry, and a decision upon complicated and important issues by the mere arbitrary dictum of a misinformed and prejudiced populace.

But, as to the recall of judges, we are not without experience; and the history of its attempted application further demonstrates its vice. It has been attempted to be justified by the claim that in Oregon, for instance, where it has been in force for four years, no abuse of the privilege has arisen and no judge has actually been recalled. But the strongest indictment against the recall comes from its advocates, or its apologists, who instance its application in Oregon and other States. One writer refers to the recall in that State as the “final crowning act to complete the temple of popular government here.” He admits, however, that actual recall movements have in many cases been prevented because, under some court decisions and the opinion of an attorney general, it is considered that additional legislation may be required to allow its operation. But the exceptional cases of its application are sufficient to demonstrate its vice. It is admitted that the recall petitions are circulated by personal, partisan opponents and, in the case of judges, by dissatisfied litigants, and that names are gathered by irresponsible circulators, whose only object is to receive the 5 cents a name reward for all names procured upon the recall petition.

Neither the petition nor the 200 words upon the ballot pretend to disclose all the motives nor the chief motives for the recall demand. A municipal officer incurred the hostility of certain property owners by opening, in accordance with his duty, certain streets which had been illegally closed. The charge against him was simply that he was “inefficient,” “immoral,” “untruthful,” and “arbitrary.” A local war between two banks divided a city against itself and one opposing faction instituted a recall against a hostile city official charging simply that he was “unsatisfactory” and had “illegally diverted public funds,” etc. A city mayor adopted a progressive policy in regard to public improvements and the charge was in vague terms of “improper expenditure,” “incompetency,” etc. Again, a councilman had furthered an ordinance deemed by the labor unions prejudicial to their interests. He was recalled upon a petition stating simply that he did not “faithfully and efficiently represent” the interests of his ward. The candidate put up to oppose him won in the recall election. In another case where the real issue was the attitude of a councilman with reference to the prohibition law, the charges were of “unsatisfactory administration,” “abuse of the emergency clause in the enactment of ordinances,” etc., with no reference to the real object of the recall movement. Cases where the recall proceeded or was determined upon the charges stated in the petition and ballot, and where the real basis of the movement was not merely personal or factional spite, are rare



occasions. It is admitted that threats of recall are commonly used to bring into line with factional demands the action of administrative as well as of judicial officers.

While no actual recall of a judge has been obtained in Oregon, attempts at judicial recall have been made, and undoubtedly other and successful attempts would have been made had it not been for the supposed necessity for further legislative action in order to make it effective. An uncompleted attempt at recall was made against a circuit judge because he sustained as legal the provisions of a city charter allowing the sale of intoxicants. The crucial instance of the application of the judicial recall in Oregon is that instituted against Circuit Judge Coke, who, upon the trial of one McClellan for the murder of a well-known citizen of Roseburg, instructed the jury that if they found certain facts, of which there was evidence favoring the defense, such facts would sustain the claim of self-defense and therefore of justifiable homicide. The instructions of the judge were exactly, in terms and in principle, in accordance with the law expressly stated by the Supreme Court of Oregon in another somewhat similar case. Their correctness is scarcely debatable from a lawyer's standpoint. The jury found the facts as claimed by the defense, and, following the instructions of the court, acquitted McClellan. Local passion and prejudice against the defendant had been excited to the point of demanding conviction and were turned against the judge, whose fairness and judicial qualities had never before been questioned. A recall petition was instituted and objection was made to the nature of the 200-word charge as not being sufficiently specific to allow proper answer. The Attorney General held that under the law the charge need not be specific and that it might, as in that case, consist of merely a series of epithets applied to the judge complained of, as "incompetent," "unfair," and the like.

It is admitted by candid advocates that these abuses of the recall are inevitable and irremediable and that it is never possible to determine whether an official has been thereby deposed upon grounds asserted in the recall petition or others really the basis of the demand for the recall; for at election he must satisfactorily justify his entire official conduct and compete with the political ambition of other candidates precommitted upon any of the judicial questions at issue, and he must, at the same time, face personal opposition at a time when it has been brought to its most virulent pitch against him and in the midst of greatest feeling of discontent, passion, or prejudice induced by ignorance, calumny, and willful machinations. It is admitted also that, as against possible influence in some cases of a salutary nature, there are many palpable instances where the very possibility of a recall has caused obvious "sins of omission" on the part of officials who refrain from enforcing the law, as they would otherwise, than for the fear of a recall. Former advocates of the recall now admit that the representative and important factors of the recall, and particularly of the recall of judges, are caprice of the public, immaterial and extraneous issues, politics, personal revenge, and deliberate misrepresentation. One Oregon writer, referring to the position of a judge in that State, says:

It is unjust, it is degrading, it is inimical to his independence that he should be compelled to defend his acts or politics or decisions with one hand and combat political ambition and personal popularity of candidates who may oppose him with the other.

## IT IS A DESTRUCTIVE MEASURE.

In theory and in practice, therefore, the inevitable effect of the recall of judges is to deprive the courts of independence. The judge sitting subject to recall, has the threat constantly hanging over him that a dissatisfied litigant, whether it be an influential individual or a community comprising perhaps the larger part of the constituent voters of his judicial district, may at any time, without cause and by an arbitrary and summary proceeding, force him to resign or to subject himself to the humiliation of a recall instituted and carried through without any of the safeguarding elements to insure him even the form of a fair hearing or of a just determination. It drags him from his high position of an independent, judicial expounder of the law to the position of a mere puppet who must, perhaps, make his decrees and his judgment false to his reason, to his conscience, and to the law in order to avoid the degradation brought about by the recall petition.

What is true in the case of one judge is true in the case of the entire judiciary. The recall of judges means a dependent, cringing, and vacillating judicial department—the destruction of all its essential functions. It is repugnant to our constitutional form of government.

## THE RECALL OF JUDICIAL DECISIONS.

The recall of judicial decisions, whether in the form presented by its leading advocate, or in any other form, is but a short cut to the disastrous results toward which the recall of judges more indirectly tends. The advocates of the judicial decision recall can not consistently repudiate the recall of judges, for the two measures are based essentially upon the same vicious fallacies. So we are told by them that these two measures of judicial recall are not inconsistent, but that generally the recall of judicial decisions would be the more effective in practice, and is generally to be preferred. As to the recall of judges, they say, "Why, yes, we are for that in any community or State where there is a real demand for it; otherwise not." This means simply that they are for the recall of judges for those who want it and they are against it for those who do not want it. As to the recall of judicial decisions, its leading sponsor declares, with shrewdness and adroit phrase which, as he obviously thinks, can not be clearly grasped and answered, that he stands for the recall by a vote of the people of only such judicial decisions as (1) are rendered by State supreme courts in declaring State statutes unconstitutional; (2) where the litigation is not one between man and man, but only where it concerns some great economic or social question involving the general welfare of the whole people or of a large class; and (3) where there is not involved the question of the validity of a statute as repugnant to the Federal Constitution. As to the class of decisions so specified, he would suspend the enforcement of the decree of the State supreme court, and refer the correctness of that decision to a vote of the people of the State. If sustained by such vote, then the decree shall be enforced; otherwise not.

The very suggestion of these limitations upon the application of this proposition of direct judicial adjudication by the people only

emphasizes its inconsistency and repugnancy to the very fundamentals of our constitutional republican form of government. A people of a State, which is only a small portion of the field of our national jurisprudence, may become wrought up on some question which is purely local or which involves the local application of some measure ostensibly meritorious in its general principles; or a State, as a whole, may become unduly agitated to the point of demanding a measure which is in essence and in effect manifestly repugnant to the fundamental principles of our Government and to the established rights of person and of property. Obviously it is not wise and it is not safe to leave to the people of such locality alone the power of direct, immediate, and final adjudication as to issues of constitutional law, the power by direct vote to set aside constitutional defenses established as the supreme law of the entire land as well as of the locality in question. Thus the very first limitation which is suggested for the application of the recall of judicial decisions is illustrative of its entire fallacy.

But, again, it is indulging in a mere delusion to attempt to confine cases which are to be subject to popular adjudication to those which do not arise between man and man and to those alone which involve questions of general welfare. Any lawyer or judge knows and any layman ought to know and recognize the fact that almost without exception the great questions which have come before and which must come before the courts, involving considerations of questions of great national importance or of social welfare of the entire people or of large classes of people, arise and are decided in cases between individuals. Great questions of public interest are not decided in any distinct class of cases instituted for the consideration of those particular questions. They arise unexpectedly, as necessarily incidental but controlling in proceedings between one man and another, in which at first the direct and concrete object of the litigation is devoid of public interest. It is impracticable to enforce the distinction suggested between cases which shall be and those which shall not be adjudicable by an appellate court, whether such court be one of judges or be one composed of the voters of a whole State.

Nor can decisions subject to popular adjudication be confined to those invalidating a State statute on grounds other than that it is repugnant to the Federal Constitution. The provisions of the Federal Constitution already above outlined comprise, in almost the very words of that instrument, the principal provisions embodied in every State constitution. Almost without exception, wherever a State statute shall be found repugnant to a State constitution, it would at the same time be repugnant to the Federal Constitution, and the question adjudicated would really be the repugnancy of a State statute to the Federal Constitution. The adjudication by the people of the locality, therefore, if rendered, could not give assurance as to the law of local rights until the same question should have been passed upon by the Federal courts. Neither can the adjudication made by popular vote be binding upon even the State courts in another similar instance, for the State courts are sworn to decide cases in accordance with the requirements of the Federal Constitution, and the vote of the people could not change a principle of fundamental law established by judicial judgment.

Any measure by which there is given to the people of a locality the direct power of adjudication upon a constitutional question means the elimination of constitutional limitations and safeguards established for the security of liberty of person and of property. In place of methods of careful and deliberate amendment of constitutions it substitutes the spasmodic, vacillating, and inconsistent expressions made from time to time of the arbitrary will of a majority temporarily in power. It substitutes for decree of judgment under the law the spasmodic will or caprice of the mob. I use the word "mob," which in similar instances never refers to the people generally, but to large numbers of the people, and it may be at times a majority, acting under the influence of passion and prejudice and against their own real interest, as distinguished from the people acting through forms and procedures of law, established with provisions safeguarding against the result of temporary passion and prejudices and operating in such a way and under such conditions as ultimately shall insure expression of the calm, sober, deliberate judgment of the people as a whole. The term so used is not a denial but an affirmation, under a constitutional democracy, of a sovereignty vested in the people.

It is unnecessary to give instances of the opportunities of the abuse of the power of popular adjudication upon constitutional questions. We may not overlook, however, the instance of Wisconsin where, preceding the year 1911, a State-wide agitation had been made by an appeal to the passion and prejudice of the voters, to demand a statute by which a large class of property owners within the State, whose title to their property had been confirmed by repeated adjudications of the State and Federal courts, should have their property taken from them by a legislative fiat and, by the same token, established in the State itself for general public use. The movement, denominated in Wisconsin as "progressive," was successful, and the Wisconsin Legislature of 1911 passed the now notorious water-power act, the provisions of which within a year were each and all, including the spirit and purpose of the act itself, declared unconstitutional by the Wisconsin Supreme Court as repugnant to several provisions of not only the State but of the Federal Constitution. No lawyer or judge, acquainted with the first principles of the law of property rights or of constitutional law, will pretend to criticize that decision. Nevertheless, such was the prejudice which had been aroused throughout the State in favor of the confiscatory statute, there is no doubt that, if the recall of judicial decisions had been there applicable, the people of the State would have voted within the time required for such a vote, and probably would to-day so vote, that the decision of the Wisconsin Supreme Court should not stand. By such popular adjudication, if it had been made in Wisconsin, the statute in question would have been sustained and would have remained effective until the question could be brought before the Federal Supreme Court in the same or in a similar case; with the result that that which is one day property in possession of its owners would, for a long period, become not their property but would be retained in the possession and control of the State; and after the end of a further period, when judicial judgment under the law finally reigns in place of the drastic and arbitrary decrees of popular passion, the same property would again have been returned to its legal owners.



It is futile to claim that the establishment of the recall of judicial decisions would be consistent with the retention of constitutional government, or that its purpose and effect are any other than to eliminate constitutional safeguards. Even in attempting to answer the charge of President Taft that the proposed new system "would result in suspension or application of constitutional guaranty according to popular whim," which would destroy "all possible consistency" in constitutional interpretation, ex-President Roosevelt expressly referred, in his Carnegie Hall speech of March 20, 1912, to the system criticized as one "amending or construing, to that extent, the Constitution"—that is, to the extent of leaving the enforcement of any constitutional provision to popular vote. The supporters of his proposition, including a well-known publisher and editor, frankly assert that the people within the jurisdiction of any constitution should, as sovereign rulers and as the makers of the constitution itself, have the power at any time by majority vote to amend—that is, to "disregard"—such constitution, and that the recall of judicial decisions is sufficiently justified because it will have precisely such effect.

The system of a recall of judicial decisions is inconsistent with our system of government. These two conflicting systems can not exist together. As stated by the Hon. Elihu Root in the speech which he delivered as president of the New York State Bar Association on January 19, 1912:

We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. We can not maintain one system in part and the other system in part. The gulf between the two systems is not narrowed, but greatly widened by the proposal to dispense with the action of a representative legislature and to substitute direct popular action at the polls. A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever, in any particular case, it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our Government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has produced and every great declaration for human freedom since Magna Charta—the truth that human nature needs to distrust its own impulses and passions, and to establish for its own control the restraining and guiding influence of declared principles of action.

#### NO JUSTIFICATION BY NECESSITY FOR RECALL OF JUDICIAL DECISIONS.

The occasion for the suggestion of the recall of judicial decisions, as outlined by its chief advocate, lies in the peculiar fact that in cases where a State statute is claimed to be repugnant to the Federal Constitution, and its validity is upheld as against such claim, then such decision is directly reviewable by the Federal Supreme Court; whereas, if the decision is against the validity of the statute and in favor of the claim of its repugnancy to the Federal Constitution, such decision is not so reviewable. This is because of the peculiar provisions of the act of Congress by which the appellate powers of the Federal Supreme Court are fixed; and the distinction is undoubtedly

made so as to avoid as far as possible an unnecessary increase of the number of cases which would otherwise come before the Federal appellate court. For a long time representative lawyers of the country have considered this discrimination in allowing appeals as unwise; and the American Bar Association and many leading lawyers have been urging upon Congress the desirability of changing the judicature act so as to render possible the review by the Federal Supreme Court of all decisions of a highest State court, which determine to be either valid or invalid a State statute on the issue of its repugnancy to the Federal Constitution. It is for the people through their representatives in Congress to say whether the remedy which is thus possible shall be adopted. It would be a logical, efficient, and direct remedy for any evils for the cure of which the recall of judicial decisions is urged. Therefore, besides objections to the recall of judicial decisions on the ground of the vice, inexpediency, and danger of such a measure, it is further shown to have no justification on the grounds of emergency or necessity, for there is open an easy, direct, and constitutional remedy for all the evils which are complained of as a basis for that measure.

#### THE JUDICIAL RECALL IS UNREPUBLICAN.

The Federal Constitution provides (Art. IV, sec. 4):

The United States shall guarantee to every State in the Union a republican form of government.

It is obvious that the judicial recall measure could not apply in any particular State without express provisions for that purpose in the State constitution. So far as State application is concerned, it must first be adopted as part of the State supreme law, as a feature of State government. The Federal Constitution contemplated a union of States having as their fundamental principles and laws of government only those which are and which should at all times remain essentially republican in form. And this provision of the Constitution was adopted to protect not merely against intrigues by foreign powers but also against the ambition and intrigues of local agitators. Its purpose was to keep uniform, within specified limits, the local State governments. As pointed out by Madison in the *Federalist*, explaining the purpose and force of this provision:

But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigue and influence of foreign powers?

As long, therefore, as the existing republican forms are continued by the States they are guaranteed by the Federal Constitution.

The only restriction imposed on them is this, that they shall not exchange republican for antirepublican constitutions, a restriction which, it is presumed, will hardly be considered as a grievance.

It is not left, therefore, to the caprice of each State from time to time to determine whether it shall adopt features of government which are unrepugnant or to repudiate entirely the republican form.

As pointed out also by Madison in the quotation of his observation upon the nature of a "pure democracy," above given, a yielding up to the direct vote of the people, as in pure democracy, is to be avoided as repugnant to our republican form of government, a government under which the people act through their representatives or through

representative departments, through whose carefully formulated deliberations and judgments, not the expressions of the temporary spasmodic will of the majority, but the deliberate, consistent, and logical judgment of the entire sovereign people, refined and corrected by careful study and consideration by individuals or tribunals adapted to that purpose, may be enforced, and that, too, consistently with the existing provisions of the fundamental supreme law as laid down in the Constitution. Not only is such representative element an essential feature of our republican form of government, but another and even more indispensable feature is the maintenance of untrammelled courts of justice presided over by judges who, during their terms of office, shall be independent, not only of the legislative and executive department, but independent of even the sovereign power of the people.

No State has been admitted having a recall provision in its constitution, and, thanks to the sturdy judicial and fearless attitude of President Taft, the precedent has been set for the refusal by the National Government to recognize either the wisdom or constitutionality of such a State constitutional provision. That some States have been driven or induced to adopt such a constitutional provision is no justification for similar action by other States. No Republic of the modern civilized world had ever experienced even the proposition for the judicial recall, much less its adoption as a constitutional provision, until within the past 20 years its advocacy was started in Oregon, where it was adopted in 1908. Even the republics of Switzerland, the birthplace of modern direct popular government, have not failed to keep their judicial departments free from the effects of popular clamor. It was left to their disciple, Oregon, to adopt the precedent for modern times of this experiment of radicalism. And the experiment has not only failed, but within the four years of its existence, has demonstrated that it is a weak, insufficient, impracticable, vicious measure.

In no case has a State constitutional provision for judicial recall been upheld as not directly repugnant to this Federal constitutional provision. There are reasons compelling the conclusion that when such questions shall arise before the Federal court it will not be left undetermined as being a mere political question. Whatever may be the ultimate methods of procedure by which the question shall be determined and the result of such determination enforced, the conclusion is manifest that the judicial recall, whether in the form commonly proposed for the recall of judges or for that of judicial decisions, is unrepugnant in its nature, that it involves a return to the tyranny of democracy, as illustrated in the rule of the demos of ancient Athens, and would be more fruitful of dangers and evils than a change which looked directly to the establishment of a monarchy.

#### A WANING CAUSE.

It is fortunate, perhaps, that local conditions in isolated localities, exciting the people of certain States to a spasmodic disregard of fundamental principles, have induced sporadic instances of the formal adoption of the judicial recall in the form of the recall of judges. Its adoption by Oregon alone was generally regarded as a local and temporary lapse from reason, and it was not until the example was fol-

lowed by California, and particularly by Arizona, that thinking people were awakened to the knowledge of the real dangers threatened by a fallacy once isolated but which subsequently was found spreading most insidiously and with great celerity. During the past 12 months no subject has received such attention whether in nonpartisan discussions or in political debates. Its injection into politics is to be deprecated, for it can not from its very nature be properly an issue of national politics. So far as its practical scope is concerned, it is purely a question of State policy or State caprice. So far as the Nation as a whole is concerned, it is a question of the science of government and of constitutional law. Comparatively few representative leaders and, almost without exception, none who are really schooled in the principles of jurisprudence, law, and government have been found among its advocates. On the contrary, from every bench and bar and associations of lawyers, from the whole membership of a learned profession entitled to authoritative expression of opinion on this question, have come deliberate protests against this greatest of modern fallacies, and not without results.

The sturdy, fearless, statesmanlike action of President Taft in vetoing the Arizona statehood bill is bringing more and more comments of approval from even his political opponents. His reasons, as stated in his veto measure of August 15, 1911, and in his consistent opposition to the judicial recall since, have had most beneficial effect in demonstrating to the satisfaction of thinking people that the issue involved in the judicial recall is not one of politics, but one of a deliberate choice between a constitutional and an unconstitutional government, between a republican or constitutional democracy and a pure democracy unrestrained by safeguarding provisions essential not only to efficiency, but also to permanence. The influence of all this opposition upon legislators, and upon the average citizen unskilled in the profession of law, is apparent. In April, 1911, the Minnesota House of Representatives adopted the recall of judges by a large majority. At the special session in June, 1912, the same house, with its membership unchanged, expressly repudiated the recall of judges by an almost unanimous vote. Its wisdom and practicability are now disputed or at least questioned by a large portion of its former adherents in the State of Oregon. The past year's campaign against this fallacy has been one of education. Hue and cry, sounding phrases and subtle ad hominem appeals to the voters as sovereign, however insidious, are met more and more with the spirit of sober reflection and by minds of a people who are now better informed and who are benefiting by the instructions they have received.

Its elimination as even a pretended issue of national politics is now fortunately assured. The personal views of President Taft are too well known to require quotation; and the party, of which he is the representative head, is now before the people with the express statement in its platform that the recall of judges is regarded as "unnecessary and unwise" and declaring that:

The social and political structure of the United States rests upon the civil liberty of the individual; and for the protection of that liberty the people have wisely, in the National and State Constitutions, put definite limitations upon themselves and upon their governmental officers and agencies. To enforce these limitations, to secure the orderly and coherent exercise of governmental powers and to protect the rights of even the humblest and least-favored individual are the function of independent courts of justice. The Republican Party reaffirms its intention to uphold



at all times the authority and integrity of the courts, both State and Federal, and it will ever insist that their powers to enforce their process and to protect life, liberty, and property shall be preserved inviolate. An orderly method is provided under our system of government by which the people may, when they choose, alter or amend the constitutional provisions which underlie that Government. Until these constitutional provisions are so altered or amended, in orderly fashion, it is the duty of the courts to see to it that when challenged they are enforced.

The same platform recognizes that the remedies for existing evils properly lie with the legislative departments by means of further constitutional measures of reform in legal procedure and in provisions for the nonpartisan selection of judges. In the words of the platform:

That the courts, both Federal and State, may bear the heavy burden laid upon them to the complete satisfaction of public opinion, we favor legislation to prevent long delays and the tedious and costly appeals which have so often amounted to a denial of justice in civil cases and to a failure to protect the public at large in criminal cases.

Since the responsibility of the judiciary is so great, the standards of judicial action must be always and everywhere above suspicions and reproach. While we regard the recall of judges as unnecessary and unwise, we favor such action as may be necessary to simplify the process by which any judge who is found to be derelict in his duty may be removed from office.

The eminent citizen selected as the representative head of the Democratic Party, Gov. Woodrow Wilson, has recently stated his position on the judicial recall as follows:

The recall of judges is another matter. Judges are not lawmakers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom is of the first consequence to the stability of the state. To apply to them the principle of the recall is to set up the idea that the determinations of what the law is must respond to popular impulse and to popular judgment. It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence by threat of recall those who merely interpret the law already established.

And his party now goes before the people urging, not disregard of law, but law reform through necessary and proper legislative measures. In the words of its platform:

We recognize the urgent need of reform in the administration of civil and criminal law in the United States, and we recommend the enactment of such legislation and the promotion of such measures as will rid the present legal system of the delays, expense, and uncertainties incident to the system as now administered.

The fallacy of the recall, as applied to courts or to decisions of courts, is meeting its own inevitable self-defeat through the increased attention, which its advocacy has forced to the nature and functions of our constitutional Government and to the real character, futility, and dangers of any remedy, under whatever label it may be presented containing the destructive ingredients of the judicial recall.

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**"The Recall of Judges and Judicial Decisions,"** address by Charles E. Shepard before the Seattle Bar Association, June 26, 1912.

The above are generally in opposition to the judicial recall.

But in favor thereof there have appeared, besides the various editorials and articles in the *Outlook*, the following:

**Popular v. Delegated Government.** Speech by Senator Bourne, of Oregon, in the United States Senate, May 5, 1910.

**The Recall of Judges**, by Miles Poindexter. *Editorial Review*, November, 1911. S. Doc. No. 472, March 28, 1912.

**The Right of the People to Rule.** Address by ex-President Roosevelt, Carnegie Hall, New York, March 20, 1912. S. Doc. No. 473, March 28, 1912.

**Labor's Reasons for the Enactment of the Wilson Anti-Injunction Bill**, by Samuel Gompers. S. Doc. No. 440, March 19, 1912.

**A Plain Talk About the Recall**, by Frank A. Munsey. *Munsey's*, May, 1912.

**Recall of Judges—Argument in Support**, by James Manahan, before Minnesota State Bar Association, July 19, 1911. *Minnesota State Bar Proceedings*.

In *Case and Comment*, November, 1911, there are articles pro and con on the Initiative, Referendum, and Recall by Senator Bourne, of Oregon; Representative Littleton, of New York; Gov. Wilson, of New Jersey; Senator Root, of New York, and others.

The following are other recent books covering the subject:

**Documents on the State-wide Initiative, Referendum, and Recall**, by Beard and Shultz. Macmillan, \$2 net.

**Why Should We Change Our Form of Government?** by Butler. Scribner's, 75 cents (negative).

**Government by All the People**, by Wilcox. Macmillan, \$1.50 net (affirmative).



*The Judiciary*  
*as the*  
*Servant of the People*

*Address before the Tennessee State Bar*  
*Association at its Annual Meeting*  
*at Memphis, June 26, 1913*

(Revised from Commencement Address before the Graduating  
Class of the Law School of the University of South Dakota,  
given at Vermillion, South Dakota, June 11th, 1913.)

*By*  
**ROME G. BROWN**  
*Minneapolis,        :-        Minnesota*



# The Judiciary as the Servant of the People.

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Address Before the Tennessee State Bar Association at its Annual Meeting at Memphis, June 26, 1913.

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By  
Rome G. Brown,  
Minneapolis, Minnesota

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Mr. President and Members of the Tennessee State Bar Association:

I notice from the program that my subject is mis-printed. It should read "The Judiciary as the Servant of the People." I am reminded, however, of the story told me by Judge Henderson as we were riding together to this meeting. One of the Judge's colored servants, whose regular work was that of general utility man about the stable, practiced as a side line preaching and exhorting among his people. One day he remarked to the Judge that he had preached twenty-two sermons in the past few months and that he never twice used the same text. When asked by the Judge how he could preach on so many different subjects in so short a time, he replied: "Well, you see, Jedge, Ah has twen'-two texes, but Ah allus preach de same sermon." That is about the case with me. I have a score or more of "texes," but my sermon is always substantially the same.

In the present wide-spread discussion which has been the result of the prevalent spasm of attack upon the judiciary, there has been no more valiant defense of our constitutional system of government than that presented to you and to this country by your most worthy president, my friend Mr. Biggs,\* and by other members of your Tennessee Bar. Were it not

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\*The Unrest as to the Administration of the Law. Annual address before Texas State Bar Assn. at Galveston, July 3, 1912.

for the special invitation which I have received to speak to you upon this subject, in which I have become interested more than ever in any other subject touching the welfare of our nation, I should hesitate to attempt at this time to interest you in any presentation which I might be able to make.

At the urgent request, however, of your president, I would call your attention to some phases of the question which possibly have not occurred to you. At the same time, I would also touch upon certain points, which, however much they may have been before presented, should in these times be rehearsed on every occasion when representative members of our profession gather together.

There are certain orthodox principles of our system of government which are so deeply rooted, such integral parts of our system of constitutional democracy, that they cannot be too often emphasized; and in these times when the heresies of disruption are sounding, widely and loudly to the popular ear, their discordant notes, and, by very force and persistence of hue and cry, attempting to drown and send to oblivion the melodious chant of the teachings of our fathers, let us, regardless of the din of fallacies, persist in our efforts, until, as in the Wagner chorus, the shrieks, even the enticing strains, of the forces of evil die away, and there shall emerge, victorious and with renewed and increased predominance, truth, sanity and respect, throughout the realm, for the essential principles of our government of law.

#### THE DOCTRINE OF A SERVILE JUDICIARY.

As against the established view, which is alone consistent with our constitutional democracy, that the judiciary is an integral, separate department of the government, with functions, the performance of which make necessary its independence from the sovereign people, it is urged that the theory of our government and of its administration, heretofore universally held and applied, has been and is wrong; and that judges and their judgments should be subservient to the changing opinions of the voters and should be the means merely of carrying out, here and there and now and then, the arbitrary will of popular majorities. It is now claimed by many that the judiciary as a

whole, and that any judge as a member of the judicial department, should be answerable directly to the people, for a failure to recognize and to enforce the popular will as the paramount law—statutes, constitutions and the fundamental law of property and personal rights to the contrary notwithstanding. The issue is between the established doctrine of the judiciary as the servant of the law, upon the one hand, and upon the other the doctrine of the judiciary as the servant merely of the people.

The new doctrine is a heresy against the principles of constitutional government as heretofore established in this country. The fact that it is such heresy is not, however, in itself a sufficient answer upon the merits. The time has passed for the mere hurling of epithets, or for the mere fulmination of phrases or terms. This doctrine of the judiciary as the pliant servant of the people is represented by those who advocate the Judicial Recall, in the form either of the Recall of Judges or of the Recall of Judicial Decisions. Let us, therefore, briefly examine the nature of these revolutionary measures.

#### RELICS OF ANTIQUITY.

While these measures are advocated in the manner of nostrums, as panaceas for some evils which exist in fact, and for many more merely imaginary, they are not, as many assume, innovations. They are, rather, worn out, repudiated theories of government, relics of barbarism, long ago proven by experience as inconsistent with a properly balanced system of government, whether in the form of a monarchy or in the form of a democracy. They had lain so long abandoned as useless, unfeasible and destructive in any system of government, that their reappearance in the present day is generally assumed as the presentation of newly invented theories of government. In fact, their advocacy today is a resurrection merely of fossils long since cast aside and buried in the sands of time.

As shown by Mr. Edward J. White in his recently published "Legal Antiquities,"<sup>1</sup> the Judicial Recall is, like the ancient crime of witchcraft, the trial by battle, the trial by ordeal, the

1. "Legal Antiquities" by Edward J. White. Published 1913, F. H. Thomas Law Book Company, St. Louis, Mo. This work is a most illuminating discussion of certain ancient customs and laws, eliminated from modern codes as relics of barbarism. The author shows that the present agitation for the Judicial Recall is merely a reversion to abuses of the past which had long ago disappeared with the growth of civilization.



punishment of death by pressure and other cruel and outworn customs, once prevalent in the administration of justice, a relic of antiquity. It is a revival of the barbarous tyrannies of the past, from systems of government under which the exercise of judicial functions rested in persons who were judges only in name and who were, in fact, merely the servile instruments by which the whim, passion or caprice of whatever power was recognized as sovereign, should be reflected. It is a relic of the once prevailing idea that the judiciary is essentially the direct servant of the sovereign power of the state. If the sovereignty was vested in a person, the tyranny of monarchy extended to the arbitrary control of the judiciary. If the ultimate sovereignty vested in the people, then the tyranny of democracy extended its control directly to the office of the judge and made him, in effect, the mere servant of the people. And it was the tyranny involved in these ancient customs which brought disaster to the governments under which they were retained.

In the oldest code of laws known, the Code of Hammurabi, King of Babylon, over 2000 years before the Christian era, it was the prerogative of the king, either to send to the judges in advance his own decision of the case, or simply to send the case to them for trial; and if a judge should, even upon hearing duly had, attempt to modify a decree or judgment once entered, even if it be to correct a palpable mistake, or should otherwise act against the wishes of the sovereign, he was expelled from the bench and also penalized in other ways. This was the practice under the same code of laws which punished the surgeon by removing the hand that performed an unsuccessful operation and which penalized the unsuccessful veterinarian who failed in the cures which he attempted.<sup>2</sup>

The Judicial Recall and its disastrous results are shown in the democracy of ancient Greece. Aristides was recalled from his high judicial office and suffered banishment by a recall at the polls. Themistocles, who refused, for favor, to declare false judgments, met the same fate. Their recall was not upon charges made, either specific or general, but was the consequence of an ignorant envy and distrust spread among the masses, whose idea of democracy was the overthrowing of authority and the display, by the humiliation of those holding high office, of

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<sup>2</sup> White's "Legal Antiquities," *supra*, Chapter 3.

the exercise of the arbitrary power left to the people as sovereign. As said by Plutarch:<sup>3</sup>

“The ostracism was instituted not so much to punish the offender as to mitigate and pacify the violence of the envious, who delighted to humble eminent men, and who, by fixing this disgrace upon them, might vent some part of their rancor.”

The Recall by ostracism was accompanied by the same mischievous results which are shown today under the Judicial Recall in Oregon and California. It was not used in the public interests to promote efficiency and honesty in the exercise of the judicial functions, but to gratify selfish or partisan prejudice. As stated by Aristotle, in exercising their power of Recall by ostracism, the people “did not look to the interests of the community, but used ostracism for party purposes.”

So the ancient Syracusans exercised the Judicial Recall by the system known as “petalism,” voting, not upon a shell, but upon the leaf of the olive tree; but this system was repealed 450 years before the Christian era, for the very reason that the fear of such arbitrary degradation deterred the best qualified citizens from taking office and because the system resulted in the selection of only the lowest types of demagogues for public offices.<sup>4</sup>

The same ancient custom prevailed in the Roman Republic, where officers, judicial or otherwise, and even citizens, could be tried upon imaginary charges at the forum of the polls, and subjected to banishment or death. This was the application of the Judicial Recall under the Roman Republic. Under the Empire, the Judicial magistrates were removable at the arbitrary will of the emperor.

The early English judges were merely the servants of the king, who had the power to remove them at will, if they refused to do his bidding; and before the Magna Charta was forced from King John at Runnymede, a litigant was obliged to purchase the favor of the king if he were to obtain justice in the king's courts. Under this system, the standards of the English judiciary were low. The judges were mere servile tools of the king, mere instruments of “graft,” as we would term it today.

<sup>3</sup> Life of Themistocles, quoted in White's “Legal Antiquities,” supra.

<sup>4</sup> White's “Legal Antiquities,” supra.

They were servants, not of the law, but the personal servants merely of their sovereign patrons.

These abuses were not remedied until by the statute of William III, it was provided that the judges should hold their offices, not during the pleasure of the king, but during good behavior, and that they should be removed only upon the address of both Houses of Parliament. Ever since that change the English judges have never been, either in theory or in fact, servants of the sovereign, nor servants of any persons or parties. They have been servants only of the law, administering the law as they found it to be, impartially, without fear or favor; and the respect since paid by the English Judiciary to the majesty of the law in that country has challenged the admiration of the world.<sup>5</sup>

#### OURS A GOVERNMENT OF LAWS.

It was to avoid the evils and abuses of ancient tyrannies, of the tyranny of monarchy as well of the tyranny of democracy, that our constitutional democracy was established and that an independent judiciary was provided, with judges holding their office during good behavior and removable only for sufficient cause and after hearing and adjudication. For over 100 years our constitutional democracy established under a system of express written checks and limitations upon the sovereign power, has stood the test of all the trials which have had the effect fully to test its efficiency, its stability, its powers of elasticity, its effectiveness in the protection of the property and liberty of its citizens and its ability to meet and adapt itself to new conditions. It was framed by man, it is administered by man; and for that reason the administration of the various departments of government, including that of the judiciary, has been and must be accompanied by the discovery, here and there and now and then, of incidental inefficiencies, evils and even abuses. Some judges, not many, have been dishonest. Some judges, though honest, have been inefficient. Exact justice in this or that instance has not been administered. The power, however, of remedy by reform of procedure, by constitutional legislative enactments, and, if necessary, by deliberate constitutional amendment, has been at all times carefully provided.

<sup>5</sup> White's "Legal Antiquities," *supra*, Chapter 3.

## THE JUDICIAL RECALL AGITATION.

But not content with the legal and constitutional forms of remedy, consistent with the principles of the constitutional system of government under which we live, a new agitation, under the guise of reform, has sprung up which directs its forces of attack against the very foundations of our government. Beginning with the local adoption of the Recall of Judges in Oregon in 1908 and followed later by the adoption in California and some other states of similar measures for the Judicial Recall, the movement has become nation-wide. Its significance and dangers are, in many states, under-estimated, because here and there, up to the present time, no special local demand for the Judicial Recall has shown itself. Within the past few months, however, the Recall of Judges by popular vote has been proposed by the Kansas legislature for adoption by the people. In Arkansas, a constitutional amendment for the Recall of Judges, initiated by the people, was passed at the 1912 election, but was held by the state Supreme Court not properly submitted and, therefore, not adopted. A constitutional amendment for the Recall of Judges has recently been adopted in the states of Arizona and Nevada. In Colorado a constitutional amendment has been adopted, not only for the Recall of Judges, but also for the Recall of Judicial Decisions. Under the latter amendment a Supreme Court decision declaring unconstitutional any state statute may be made ineffective by a majority of the votes cast by the state electors at a referendum election held to pass upon the decision complained of; and if the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by the electors of the municipality in question at a referendum election held to pass upon such decision. Thus is established, in Colorado, a sort of local option as to control over the final judgments of the highest court of the state. The Minnesota legislature has just proposed for adoption a constitutional amendment providing for the Recall of Judges. In many of the forty or more state legislatures which have just adjourned, measures for constitutional amendments providing for the Judicial Recall were presented, and in some of them, while not successful, received surprisingly strong support. In North

Dakota, the measure was lost by only one vote.

In the recent Massachusetts legislature, a measure was presented and strongly urged authorizing the Recall of Judicial Decision in all cases when "a law otherwise duly enacted by the legislative authority of the commonwealth shall be held by the Supreme Judicial Court to be in violation of the constitution." In April last, there was introduced in the Congress a joint resolution proposing to the states the election of all federal judges by vote of the people with a tenure of twelve years, and providing for a Recall of all judges, both of the Supreme Court and inferior courts, at any general election at which presidential electors shall be chosen.<sup>6</sup> A senate joint resolution was introduced in December, 1912, proposing a constitutional amendment providing that any decision of the Federal Supreme Court declaring unconstitutional an act of the Congress, may be submitted by the Congress to the electors and that by vote of a majority of congressional districts and of the states, such act should, notwithstanding the decision of the Supreme Court, become a law.<sup>7</sup>

To this extent has already spread the agitation for the Judicial Recall. This agitation presents questions which are present living issues. They are questions, not of politics, but of science of government. We should study them, free from partisan bias, as students of science and history, and should advocate publicly and in private the conscientious and deliberate conclusions to which we come. And we should be actuated in so doing by no motive or purpose other than to perform conscientiously the duty which rests upon us as citizens and as lawyers.

### A GOVERNMENT OF LAWS OR OF MEN?

The question which confronts us is, Shall our government remain a government of laws or shall it become merely a government of men? Shall it remain a self-limited, constitutional democracy, a government of checks and limitations necessary to insure consistency, equality and stability, or shall it and the liberty and property of those living under it, be subject at

<sup>6</sup> See House Joint Resolution 26, 63rd Cong., 1st Session, introduced April 7, 1913, by Congressman Lafferty.

<sup>7</sup> Senate Joint Resolution 142, 62nd Cong., 3rd Session, introduced December 4, 1912, by Senator Bristow.

any time and directly to the unrestrained and unlimited whims, passions and caprice of temporary majorities? This distinction between a government where the law is supreme and one where the will of the people is directly supreme, a government of laws as against a government of men, is one which has been made by every authority upon the science of government from the time of Aristotle to the present date.

Today the quack and the demagogue are rampant—to the extent that the doctrines of socialism, under one disguise or another, and old, discredited theories and customs, relics of antiquity, are urged to replace the teachings of the fathers of our republic.

That species of democracy where the people and not the law is supreme is, as stated by Aristotle,

“produced by the influence of the demagogue. \* \* \*  
A democracy of this sort is analagous to a tyranny,  
\* \* \* The demagogues are, by referring everything to the people, the cause of the government being administered by popular majorities, and not according to law, since their power is increased by an increase of the power of the people, whose opinion they command. The demagogues likewise attack (the courts and) the magistrates and say that the people ought to decide; and since the people willingly accept the theory, the power of all the magistrates is destroyed. Accordingly, it seems to have been justly said that a democracy of this sort is not entitled to the name of a constitution, for where the laws are not supreme, there is no constitution.”

So the demagogues today reach out for popular favor by attacking our constitution as well as the fundamental laws established expressly for the safeguarding of liberty and of property, and join the socialists in the alluring cry that everything—property, liberty and the fundamental law safeguarding both—should be turned over directly to the people as a whole, to be administered, not upon any consistent theory or principle, but according to the temporary popular prejudice. Conservation is made a cloak for confiscation. Need of judicial reform is made an excuse for an attempt to wipe out the constitution and the courts. The people are fed upon that which is most destructive of their own interests. This is the day of the rule in politics of the casuist and the sophist. Our private and public councils



are ruled too much by the demagogues. The remedies for ailments of our body politic are prescribed, and often administered, by quacks: We are fed upon socialism. It is the day of the rule of the phrasemaker, the peddler of fallacies, the purveyor of the *non sequitur*; it is the day of the rule of the muckraker, the muckraker in politics and in journalism.

Much, however, as we condemn the muckraker who extends his poisoning influence from the speaker's platform, the most vicious element in public life today is the muckraking journalist. Unscrupulous and despicable contributors, under the guise of journalists, are combined with certain degenerate-minded and sordid publishers to sacrifice the name and fame of honorable men and to debase the authority and reputation of the very office which they occupy. To discriminating persons, they shock all sense of decency. To the indiscriminating, which compose a large mass of the readers, they calumniate our judiciary by false statements, by subtle innuendos, by methods which too often carry conviction. Their business is to traduce men in high office and cater to the wide-spread madness for sensation, in order to sell for profit more of their wares. Such men are pirates, outlaws, and should be treated as such in the forum of public opinion.

And let me say right here, gentlemen, that, great as I consider the honor of the request to speak to you today, there was even a greater inducement presented by your invitation. I am repaid for my effort to be here by the satisfaction of a long-felt desire to shake hands with that worthy member of your bar, Mr. Caruthers Ewing, who paid his respects, about a year ago in his address before the Georgia State Bar on the subject, "The Spirit of the Times," to a certain "Connolly person," formerly traducer of the judiciary, now plaintiff in a many thousand dollar libel suit. I congratulate your bar upon having such a member. I congratulate the member himself upon being accredited with that versatility, that power of imagination, that inventive genius, which could enable him to libel—although he but mildly spoke the truth about—the most despicable muckraker known in modern journalism.

And there is today a still more degrading influence—that of the wishy-washy, non-combatant editor, who watches the weather-vane of politics to determine his editorial policy; who



remains neutral upon important questions, against his real convictions, having more regard for the preservation or increase of his subscription list than for the preservation of morality and of the fundamental laws upon which depend the continuance of our constitutional democracy.

Whether under a government of laws or under a government of men, the people are in theory and in fact the supreme rulers; but under the one system, they are subject to checks and limitations, to protect against the tyranny of majorities, and in the other, regardless of any fundamental paramount law, the people at any time, unchecked and unrestrained, may do what they will. It is in respect of this distinction that the democracies of the world's history have differed. It means the difference between the greatest republican democracy ever known in history—that established under our own constitution, which Gladstone pronounced "The most wonderful work ever struck off at a given time by the brain and purpose of man"—and such a tyrannical and unstable democracy as, for instance, that of ancient Greece, or such a constitutional democracy as we have today in Mexico. Ours is a democratic government, where the law is supreme. Mexico is a democratic government, not of laws, but of men. Take your choice.

#### THE CRAZE FOR CHANGE.

Upon the plea of social and moral advancement—a plea sometimes sinecure, but too often a mere pretext for the prevalent craze for change—we hear today the much abused term "Progress and Reform." Progress necessarily implies change, but it is not true, as is too often assumed, that change always means progress. The self styled "Progressive" of today may be a helpful reformer. "Progressive is that progressive does," said President Taft. We must look in all cases beneath the self imposed label to determine whether the man, or the measure, is one representing change without progress or a really progressive change.

Until comparatively recent years, the political parties in this country, while differing in matters of policy as to questions of administration of our government or of its departments, and with many of their differences comparatively fundamental, were, nevertheless, united upon the proposition that this constitu-

tional democracy—that the essentials of our constitutional government—should be respected and should be preserved. Differences as to the fundamental form of our government, though sometimes sectional, have never become issues of political parties until the injection into the arena of American politics of the principles, or rather vagaries, of the German socialists. I am not here to preach against socialism. Like most other “isms” it has now and then, more or less, as to some of its teachings, a sane and even scientific basis. But you will agree with me, I am sure, that the label “socialist” implies for any man or measure that it bears also the brand of “suspect.” Upon examination, the measure may turn out to be a salutary reform; but, *prima facie*, and without being given a character by credible evidence, it is discredited by the company that it keeps. Its very source, if it is of socialist origin, is an impeachment; for, even if not pernicious in itself, we distrust it because it is being urged, with other obviously evil measures, as a means to accomplish a most pernicious ultimate object—the destruction of not only our form of government, but of any and all form of government.

#### AN INSTRUMENT OF SOCIALISM.

The fact is, therefore, not without significance that the modern advocacy of the Judicial Recall measures sprang from socialism. The present socialist labor party was the first political party in America to demand the Recall. The Judicial Recall measures are essentially instruments of socialism.

The leading organ of the socialists—“The Appeal to (T)reason”—speaking of the Judicial Recall, says

“It is the means whereby the people will be enabled to inaugurate Socialism, and after that is done, they may secure democracy in industry.”

Its advocates, who are such as Senator Bourne, say that the “chief function” of these measures is to “restore absolute sovereignty of the people” and they define sovereignty as “the supreme ruleship.” Now that is just what the socialists say. It is the socialists’ platform which, after the recall plank, urges the abolition of the power of the courts to declare statutes unconstitutional and claims that this power has been “usurped” by

the courts. And then, to leave no doubt of what is meant by the socialism which is to be "inaugurated" by means of the Judicial Recall, the same socialist platform declares that these measures

"Are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance."

Think of these things when you are told that the functions now exercised by our courts are exercised by mere usurpation; and when you are urged to wrest from the courts these powers and turn over to the people the direct adjudication of constitutional questions.

#### SAFEGUARDS OF THE CONSTITUTION.

It is no answer when the advocates of the Judicial Recall say that it is a salutary measure "if rightly used," and that we may depend upon the people not to abuse it. The same may be said of the very absence of any governmental provision. Governments are established, not for the Utopian standard of civilization, where people live at all times unselfishly in peace with each other. Governments are established to meet emergencies, to prevent the over-reaching by one individual of another and by one class of another; and, in a democracy, to safeguard against the tyranny of temporary majorities. So it is that our constitution provides that private property shall not be taken for public use without compensation, no matter that a local or temporary majority may pass a statute having that effect. Such a provision is repugnant to socialism. Its elimination means the inauguration of socialism. So also our constitution provides that no statute shall be enforced which impairs the obligation of contracts, or which is based on an arbitrary class distinction, or which shall prevent freedom of worship. These and similar provisions are in our federal and state constitutions. Upon their observance and enforcement depends our liberty, our rights of property and our freedom as civilized beings.

The primary function of the judiciary is to enforce these constitutional safeguards as the supreme law of the land. That function cannot be fulfilled without maintaining the independ-

ence of the courts and is destroyed to the extent that we turn over to the mere vote of majorities the right directly to control a judge, or the right directly to control the adjudication of constitutional questions.

### THE RECALL OF JUDGES.<sup>8</sup>

The Recall of Judges destroys the dignity and independence of the courts and is indirectly destructive of the judicial department and of all its functions. Its only basis is that doctrine which we have seen is a long-ago buried relic of antiquity—the doctrine that the judge is the mere servant of the sovereign; whereas, under a government of laws, servility in a judge, in favor of either sovereign or subject, is proof of unfitness. Indeed, the practical application of the Recall of Judges, as experienced in Oregon and in California, has proven that it is impracticable so far as accomplishing any of the results for which it is claimed to have been instituted. In Oregon, the attempts at the Recall of officers, judicial and executive, have shown that the real motive and purpose of the Recall have been based upon sectional or partisan differences, and that, no matter what the formal charges might be, in most instances the real basis of the Recall has been a prejudice artificially worked up against the incumbent and the desire of another candidate to take this place.<sup>9</sup>

The Recall, moreover, is exercised not by a majority, but by a minority, which, in some cases, is only a small minority of the voters. Thus it is that this so-called “progressive” measure has brought us back, in all states where the Recall has been applied, to the evils experienced in ancient Greece as described by Aristotle under the old system of ostracism by popular vote.

The other day there was enforced, for the first time in California, the power of the Judicial Recall. Judge Weller, of a San Francisco court, reduced the bail of a man charged with a criminal offense from \$3,000 to \$1,000. The man had a family

<sup>8</sup> There is not here attempted a detailed discussion of the arguments for and against the Judicial Recall. These questions are more fully treated in the address before the Minnesota State Bar Association given June 19, 1911, published as S. D. 649, 62nd Cong., 2nd Session; and in article in September, 1912, number of the “Annals” of the American Academy of Political and Social Science, published as S. D. 892, 62nd Cong., 2nd Session. For selected bibliography upon this subject, see appendix to the latter document, and also the 1912 and 1913 reports of the American Bar Association Committee to Oppose the Judicial Recall.

<sup>9</sup> Operation of the Recall in Oregon, by James G. Barnett, American Political Science Review, February, 1912.

and was able to furnish the reduced bail in cash. Judge Weller's action was not different from that of other judges in similar instances. In this case, it happened that the accused disappeared and defaulted his bail. A hue and cry were started against the judge, which resulted in a recall petition, urged by a lot of hysterical women, flushed and arrogant over their own recent acquirement of the franchise. He was compelled to go to the polls on the question of his Recall and of his re-election as against an opposing candidate by the name of Crist. Weller was recalled and Crist elected by a margin of less than 800 votes. The total number of votes cast at the election was 62,876, of which over 25 per cent were women; and the total vote cast was less than 50 per cent of the number of voters qualified to vote at the election. The total vote in favor of the Recall was less than 25 per cent of the total number of qualified voters. Thus the Recall is enforced by the small minority. This late instance again proves that it is a vicious measure in theory and still more vicious in its practical application.

#### THE LATEST INSTANCE OF THE ABUSE OF THE RECALL.

Just as I was leaving Minneapolis for Memphis, I received word of the latest instance of the attempted application of the Judicial Recall. Judge John C. Phillips, a Superior Court Judge of Maricopa County, Arizona, had sat in the case of one John Strinkler against the Ray Consolidated Copper Company, a personal injury suit to collect \$40,000 for the loss of a leg alleged to have been caused by the negligence of the defendant. After the close of the evidence, Judge Phillips, after lengthy argument, directed a verdict for the defendant. Plaintiff's attorneys made a motion for a new trial which is not yet decided, but is still held under advisement by Judge Phillips. However, on June 17th, last week Tuesday, a Recall Petition agitated by the labor unions, was filed. 5,350 votes were cast at the judicial election in 1911, so the petition, under the Arizona laws, requires 1,070 signatures of qualified electors. These were obtained among the laboring people in Phoenix. The wording of this petition which is supposed to constitute the charge to which a defense can be made by the judge and upon which the question of Recall is to be decided by the people, reads as follows:

"We, the undersigned, qualified electors of the county of Maricopa, state of Arizona, do hereby petition for the recall from office of John C. Phillips, judge of the superior court of Maricopa county, state of Arizona, as provided by Article VIII of the Constitution of the state of Arizona, as amended.

This recall is invoked for the reason that the Honorable John C. Phillips, has proven incompetent to occupy the position of superior judge of Maricopa county and for the further reason that he has in the past few months refused to permit juries to pass upon issues of fact in cases in the said superior court and in doing so he has seemed to favor the man of wealth and the corporation as against the working man who was injured or killed. Believing this to be against American principles and against ordinary justice, we seek the recall of the aforesaid superior judge and the election in his stead of one competent who will administer the law in a spirit of justice without reference to distinction among our citizens."

Judge Phillips is a man who is an old-timer of Phoenix and who originally worked in the streets selling fruit and later worked in the erection of the state capitol. He says, "I am sure that the Divine Providence will take care of any judge who does his duty."

It is evident that only an intervention of Providence can prevent an abuse of the Recall in his case. Providence is wise and Providence is good, but it is evident that an education of sanity upon these questions must be promoted by every lawyer and every organization of lawyers in the land.

#### THE RECALL OF JUDICIAL DECISIONS.

The Recall of Judicial Decisions is still more drastic and more directly destructive of the essential functions of the Judicial Department of government. Its advocacy is enticing to the ordinary citizen, who is too easily deceived as to its real significance. The phrase-makers play upon the passions and prejudices of the voters. It is a favorite theme today of the demagogues. But that arch-demagogue of modern times, the founder of the third term party, when put to the test, is forced to admit that the Recall of Judicial Decisions means nothing more nor less than the nullification, or at least the arbitrary suspension, of protective features established by the express



written constitutional safeguards. In place of the methods of deliberate and constitutional amendment now provided, and in place of any remedy to make such methods speedy and efficacious, the Recall of Decisions takes the question of judicial adjudication out of the power of the courts and places it immediately and directly in the hands of the voters. In effect, it wipes out all the safeguards of constitutional limitations. It results in amendments, or rather in suspensions and nullifications of constitutional limitations, without preserving either the elements of principle, of consistency or of equality. In substance it gives to voters the power to disregard the purpose and effect of any particular constitutional provision. It provides for the arbitrary suspension of constitutional protection. It does not effect, in essence, a constitutional amendment, but permits arbitrary, inconsistent and vacillating suspension or application of the constitutional safeguards.

In attempting to answer the charge of President Taft that the proposed new system "would result in suspension or application of constitutional guaranty according to popular whim," which would destroy all possible consistency in constitutional interpretation, ex-President Roosevelt, in his Carnegie Hall speech in March, 1912, expressly referred to the Recall of Decisions as having the effect of "amending or construing to that extent the constitution"—that is, to the extent of leaving to popular vote the enforcement or non-enforcement of any constitutional provision as applied to any particular statute. So Dean Lewis of the Pennsylvania Law School, the chief apologist for this measure, refers to it as "A new method of constitutional amendment by popular vote."

#### A DISCREDITED PROPOSITION.

Mr. Roosevelt speaks of this measure as "My remedy" and assumes to have been its originator. We have already seen that this measure, and the doctrine upon which it is based, is in reality a relic of antiquity. Its source is the antiquated and exploded theory that the judiciary should be directly subservient to the sovereign; and that where sovereignty vests in the people, the judicial department should be merely the servant of the people. In fact, the Recall of Judicial Decisions was proposed, discussed and rejected in the Australian constitutional conven-



tion ten years before it was ever mentioned, or, probably, ever thought of, by Mr. Roosevelt. Australia, after a most thorough discussion, unanimously rejected the Recall of Decisions as manifestly inconsistent with its new constitutional form of government; at the same time that the enlightened and progressive people of that entire continent adopted a constitution modeled in all its essential features upon that of this country.<sup>10</sup>

In an editorial in the Outlook of August 31, 1912, Mr. Roosevelt cites the Legal Essays of James B. Thayer, who, in his lifetime, was professor in the Law School of Harvard University; and implies that Prof. Thayer is authority in favor of the Judicial Decision Recall. He refers to Prof. Thayer as "Dean" Thayer, although Prof. Thayer was never dean. That position, however, is now occupied by Prof. Thayer's son, Ezra Ripley Thayer, who, in a recently published article, which is a most scholarly and convincing discussion, has met and answered all the essential arguments advanced for the Recall of Judicial Decisions and has proven that Mr. Roosevelt has again indulged in an erroneous citation of authority.<sup>11</sup> Dean Thayer says, after reviewing Prof. Thayer's teachings:

"Such things as Mr. Roosevelt's proposal and the state of public feeling from which it sprung are the precise evils against which Mr. Thayer's warnings were directed. \* \* \*

Among the evils which such judicial action brings in its train is suspicion of other decisions involving no such error and needless attacks on our constitutional system to secure ends attainable by means now at hand. These are to be expected from ardent reformers distinguished for courage and acuteness rather than sanity or patience, whose lack of training in the law leaves them unaware of the flexibility and scope of our existing constitutional machinery. \* \* \*

Under the proposed system, the form of a constitutional limitation remains, but it is binding only to such an extent and in favor of such persons as the majority of voters may choose. The citizen thus has no rights which the legislature and the majority acting together are bound to respect."

There is no excuse or necessity in this country for the Recall of Decisions. One of the chief arguments for its adoption is,

<sup>10</sup> See address on "Constitution and Courts" by Justice Rousseau A. Burch of the Kansas Supreme Court, March 30, 1912.

<sup>11</sup> Recall of Judicial Decisions, by Ezra Ripley Thayer, Dean of the Law School of the Harvard University, in Legal Bibliography of March, 1913. Published also as S. D. 28, 63rd Cong., 1st Session.

that there is at present no appeal to the Federal Supreme Court from the decisions of state courts invalidating statutes on the ground that they are repugnant to the federal constitution, but that such appeal lies only when state courts uphold state statutes against the claim that they are unconstitutional. This deficiency, which has been long recognized, can be easily cured by changing the Judiciary Act, which it is within the power of the Congress to do; and such change is favored by the American Bar Association and by lawyers generally.

### THE GUARANTIES OF LIBERTY.

Return with me for a moment to a few elementary facts. In both federal and state constitutions are express written restrictions upon the power of legislatures, restrictions which were adopted to protect the property and liberty of citizens and to prevent confiscation and oppression by mere vote of temporary majorities. In order to prevent local abuses by legislative enactment, the safeguards of liberty embodied in the federal constitution were made the supreme law of the land, controlling the action of all courts, federal and state. It was directly and expressly provided in Section 9, Article I, against the suspending of the privilege of the writ of habeas corpus and the passing of bills of attainder or *ex post facto* laws, against the levying of disproportionate taxes and of duties upon articles exported between these states; prohibiting any state from enforcing any law impairing the obligation of contracts and from levying any impost or duty.

The same supreme law prohibits the congress from interfering with the establishment and free exercise of religion, with freedom of speech, and of the press, or the right of people peaceably to assemble and to petition for redress of grievances; against the quartering of soldiers in any house without the consent of the owner, the violation of the security of person and property against unreasonable searches and seizures without warrants properly verified and issued, depriving any person of his life, liberty, or property without due process of law, and the taking of private property for public use without compensation; and insuring the right of trial by a jury for criminal prosecutions and the protection of the accused against arbitrary and illegal punishment, the prohibition of slavery

or involuntary servitude at any place within the jurisdiction of the United States; and further prohibiting any state from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of his life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the law; and prohibiting either the United States or any state from denying or abridging the rights of citizens on account of race, color, or previous condition of servitude.

Read and consider these limitations, take any one of them, and as an individual, ask yourself seriously the question whether you, yourself, from considerations of your own selfish interest, would willingly and deliberately hazard the risk of giving up forever the safeguard to your life and liberty expressly vouchsafed by the protective provisions thus established as the law of the land, which no legislature and which no majority of the people may ever capriciously set aside. If you happen to feel no selfish need of such protection, then consider the question as one touching your own posterity, or as one concerning the entire citizenship of this republic and those who shall come after them, and at the same time concerning the very integrity of the government under which you and yours, and they and theirs, are to live. Not until you have brought yourself to the conclusion that, not merely one or a few of such limitations, but each and all of them, without exception, are unnecessary and unwise, and that they, each and all, may at any time be disregarded—not until then can you be a consistent supporter of the Judicial Recall. These are questions which are, as is the question here under consideration, finally answered in only one way by any citizen who has calmly considered all the facts pertaining to the issue and whose conclusion is the result of cool, deliberate and impartial judgment.<sup>12</sup>

#### INSTANCES OF RESULTING ABUSES.

Examples are apparent of the disasters which might result from the application of the Judicial Recall. Take the well known constitutional provision of the federal and all state con-

<sup>12</sup> I wish especially to commend to your attention the recent discussion of these questions presented in "The Judiciary and the People" by Frederick N. Judson. Published 1913 by the Yale University Press, New Haven, Conn.

stitutions that private property shall not be taken for public use without compensation. Under the present system, any statute which had this effect would be declared invalid by the courts. By the Recall of Decisions, this constitutional safeguard could be eliminated by a mere vote of the people at any time and under any circumstances. They could vote if they chose that all railroads, or any particular railroad, that all lands or any particular pieces of land, or that all property or any property now held in private ownership, could without compensation, be confiscated to the state for general public benefit and even for general distribution.

It was during the last campaign that I listened to a campaigner of the socialist party, speaking upon a street corner in the city of Chicago. He stated that the ultimate object of his party was to smash our present form of government and the individual rights of persons and of property of which it is protective. He inveighed against our government of laws and urged a regime where there will be no legislatures, no courts, because there will be no functions for them to perform; where there will be no master or servant, no distinction between workers and drones, no wage, and no private ownership of property. The people, he said, should "take back" to themselves through appointed agents, the railroads, the mines, the ships, the lands and the buildings and improvements thereon, the business industries, their accumulations and profits—all from their present holders for the benefit of the people; and they should do this without compensation, because, as he said, "all property privately held has been stolen from you and from me."

In other words, the only obstacles which stand between our present system and socialism are the existence and preservation of these constitutional safeguards. No wonder that socialists urge that the Judicial Recall will enable them to "inaugurate" socialism. And in no better class is Senator Bourne and others who advocate the Judicial Recall as a means of arriving at an "absolute, unrestrained rulership of the people." When their object is accomplished, constitutional democracy will be at an end.

Take another instance. The Bills of Rights in our constitutions prohibit the interference with the establishment and free exercise of religion. If any community, whether it be a city,

county or state, should attempt to place undue restraint or burdens upon one religious sect as against another by a statute acceptable to a majority, such statute would be invalid. Thus, religious liberty is now vouchsafed to every individual and to every community and the permanence of such safeguard is insured so long as constitutional provisions are free from the results of temporary or local prejudice of this or that community. But this protection is swept away by the application of the Judicial Recall. If the constitutional provision may be suspended or disregarded at any time or place, or as to any particular statute, by a mere majority vote, then any locality, where a majority of the voters may happen to be of one religious sect, may pass, either by direct initiative or by their legislature, a statute oppressive of the minority and the same majority by popular vote are given the power to say that the constitutional prohibition shall be ignored as to such statute.

Accordingly, whether it be a question of protection of religious freedom or of the protection of the property or liberty of persons, each and all such provisions may, under the Recall of Decisions, be ignored by the arbitrary will of a local, temporary majority.

These are practical, probable abuses. The possible abuses are unlimited; for the very essence of the proposition is to do away with restraint and with safeguards, and to make the statute-making power identical and coincident with the power to declare its validity and to compel its enforcement.

#### THE FALLIBILITY OF POPULAR MAJORITIES.

It is not a question of whether the courts make mistakes. The question is, Is it safe to deprive the courts of their functions and to turn them over to the direct vote of majorities? It is often answered that the good sense of the people at large, as evidenced by their voice at the polls, may be safely relied upon. This was not the judgment of the framers of our constitution; for it was to protect against the probable and possible errors of temporary majorities that safeguards were written into the constitution. Why, up in Minnesota, two years ago, the country members of the legislature caused to be submitted to the voters of the state a constitutional amendment providing

that, regardless of population, certain city districts should not be allotted a number of senators in excess of seven. This was known as the "seven senator" measure by which it was intended to discriminate in favor of the country and against the large cities in reapportioning the legislative districts under the last census. The two localities especially attacked were those represented by the two cities of St. Paul and Minneapolis. Nevertheless, at the state election, the seven-senator amendment passed in St. Paul and nearly obtained a majority in Minneapolis. The voters of those two districts were of average intelligence and yet they voted in favor of a measure directed especially against them. That it was not adopted by the entire state was due to the mere accident that the country districts happened to vote against it.

The temporary judgment of the voting citizenship cannot be relied upon for wise and consistent action. But it is in the exercise of the Judicial Recall that the temporary prejudices, passions and ill-considered judgment of the voters are expressed. The present system provides for measures of reform, whether in matters of procedure or in expression of the deliberate judgment of the people as to constitutional amendment. There is already a legal and constitutional way provided for the correction of all evils, and for the expression in the form of valid laws of the real, ultimate, deliberate judgment of the sovereign people; but that expression of the sovereign will and its enforcement should be made consistently with the methods which characterize our government of laws, and with the preservation to the judicial department of all its functions. The independence of the judge should not be assailed by making him at any time directly answerable to the people. The protective features of our constitutions and the essential functions of our judiciary should not be replaced by measures which allow the authors of a statute the privilege of dictating as to its enforcement. Our present system of government by law should not be replaced by a system of government by men. The judges and the entire judiciary should be maintained and supported as servants only of the law. In his duties as a servant of the law, a judge should be free to act independently and, as said by Chief Justice Marshall, "With nothing to control him but God and his conscience." He should at all times be free to heed the admonition

given by Moses to the Judges of the Israelites:<sup>13</sup>

**"Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; *ye shall not be afraid of the face of man*; for the judgment is God's."**

Our judges should be left free to live up to the ideal of the just man, who, in the words of Horace,

**"Firm in the consciousness of right, disdains, with equanimity, the frowns of a tyrant and the clamors of a mob."**

**ROME G. BROWN.**

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<sup>13</sup> Deut. 1, 17.

Additional Note: Read "Popular Government, Its Essence, Its Permanence and Its Perils," by William H. Taft, now Kent professor of law at Yale University, published, 1913, by Yale University Press, New Haven, Conn. This discussion by ex-President Taft has been published since his election as President of the American Bar Association. It is a non-partizan discussion of popular government under the Federal Constitution and presents many of his best utterances on the question of the Judicial Recall, including his address at the recent American Bar Association meeting in Montreal, Canada. This book, and also that of Mr. Judson on "The Judiciary and the People," noted above, should be read by every lawyer and by every citizen who desires to know and appreciate the significance of the present widespread agitation in favor of Judicial Recall measures.



# The Recall of Constitutional Safeguards

By  
ROME G. BROWN  
Minneapolis, - - Minnesota

Annual Address before the Oklahoma State Bar Association  
at Oklahoma City, December 29, 1913



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Mr. President and Members of the Oklahoma State Bar Association:

I take it that the object of your invitation to me to speak here today was the same as that which I had in accepting. The members of the bar of this great state cannot be instructed by me in constitutional law, particularly upon points which touch the very elementary principles of our system of government. Your purpose, my purpose, our common purpose, is to voice, not the one to the other, but all together, in this assembly of lawyers, a vigorous protest against the now prevalent teachings of the disciples of unrest who are spreading misinformation about, and distrust and disregard for, our system of government. We are here to protest against fallacies repugnant to our constitutional form of government.

It is necessary, therefore, that for a moment we go back to first principles, to the elementary principles which are the basis of our system of government; because it is these elementary principles which are disregarded in the attacks made by the advocates of judicial recall measures.

As against the established view, which alone is consistent with our constitutional democracy, that the judiciary is an integral, separate department of the government, with functions the performance of which make necessary its independence from the will of the sovereign people, so far as the expression of that popular will is the expression merely of the passion, whim, or caprice of temporary or local majorities,—it is now

urged that the theory of our government and of its administration, heretofore universally held and applied, has been and is wrong. It is asserted that judges and their judgments should be subservient to the temporary, changing opinions of the electorate, and should be the means merely of carrying out, here and there, and now and then, the arbitrary will of popular majorities. It is now claimed by many that the judiciary as a whole, and that any judge as a member of the judicial department, should at all times be answerable, directly, to a majority of those voters who chance to pass upon the question, for a failure to recognize and to enforce the temporary popular will, however changing and however vacillating or contradictory, as the paramount will,—statutes, express constitutional provisions and the fundamental law of property and personal rights to the contrary notwithstanding. The issue with which we are confronted is not merely that of remodeling an independent judge into a servile tool of popular passion; it does not involve merely the divesting of the judiciary as a whole of all its essential functions, established in the judicial department as an essential feature of our form of constitutional democracy. The issue is not merely between the preservation of our constitution in its present form and replacing it with another and different form of fundamental law. The issue is, shall ours remain a democracy with a constitution protective of the life, liberty and property of the citizens who live under it, or shall we have a system of government without any constitutional protection? The attacks which are being made are direct attacks upon constitutional government. They are attacks upon every safeguarding feature deliberately written into our constitution and without which it ceases to have any practical efficacy.

The judicial recall, as at present proposed, whether in the form of recall of judges or of judicial decisions, would be in essence and in effect a recall of constitutional safeguards.

#### A HERESY AGAINST CONSTITUTIONAL GOVERNMENT.

This antiquated, but now revived, doctrine of recall is a heresy against constitutional government. It is an instrument and a part of the propaganda of socialism, as I shall more fully

show. The fact that it is such heresy is not, however, in itself a sufficient answer upon the merits. The time has passed for mere indulgence in derision, for the mere hurling of epithets, or for the mere fulmination of phrases and terms. The time has passed, too, when we, the lawyers of the land, can sit inert and complacently view the advocacy of the judicial recall merely as the work of vagarists, and depend upon the traditional good sense of our citizens to detect ultimately the dangers of the present agitation. The questions involved have become present, vital, living issues. They are questions, not of politics, not of parties, not of persons, but of the science of government. We should study them free from partisan bias, as students of history, of government, and, above all, as students of the law. We should advocate in public and in private the conscientious and deliberate conclusions to which we come. We should help teach those who are less informed; we should rouse to conviction and stir to active co-operation all men, and particularly those of our profession, in unmasking this subtle and dangerous fallacy before the citizens of this republic of whose rights and interests it is ultimately subversive. In doing so we should be actuated by no motive or purpose other than to perform conscientiously the duty which rests upon us as citizens and as lawyers.

#### OUR CONSTITUTIONAL SAFEGUARDS.

Return with me for a moment to a few elementary facts. In both federal and state constitutions are express written restrictions upon the power of legislatures, restrictions which were adopted to protect the property and liberty of citizens and to prevent confiscation and oppression by mere vote of temporary majorities. In order to prevent local abuses by legislative enactment, the safeguards of liberty embodied in the federal constitution were made the supreme law of the land, controlling the action of all courts, federal and state. It was directly and expressly provided in Section 9, Article I, against the suspending of the privilege of the writ of habeas corpus and the passing of bills of attainder or *ex post facto* laws, against the levying of disproportionate taxes and of duties upon articles exported between these states; prohibiting any state from enforcing any

law impairing the obligation of contracts and from levying any impost or duty.

The same supreme law prohibits the Congress from interfering with the establishment and free exercise of religion, with freedom of speech, and of the press, or the right of people peaceably to assemble and to petition for redress of grievances; against the quartering of soldiers in any house without the consent of the owner, the violation of the security of person and property against unreasonable searches and seizures without warrants properly verified and issued, depriving any person of his life, liberty, or property without due process of law, and the taking of private property for public use without compensation; and insuring the right of trial by a jury for criminal prosecutions and the protection of the accused against arbitrary and illegal punishment, the prohibition of slavery or involuntary servitude at any place within the jurisdiction of the United States; and further prohibiting any state from making or enforcing any laws which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of his life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the law; and prohibiting either the United States or any state from denying or abridging the rights of citizens on account of race, color, or previous condition of servitude.

These and similar limitations in our constitutions, state and federal, are the safeguards of life, liberty and property, expressly written into our fundamental law. In the fact that they are expressed as definite constitutional provisions lies the peculiar efficacy, the characteristic safeguarding features of our constitutional government, which distinguish it from the unlimited constitutions of the past and have made it the scientific model for all the modern world. It is these features which have saved our republic from the disasters invariably resulting to the pure or unlimited democracies of history. They have effectively safeguarded individuals and minorities against the oppressions of a tyranny of democracy. It is these safeguards which make ours a government of laws instead of a government merely of men.

Read and consider these limitations. Take any one of them, and as an individual, ask yourself seriously the question whether you, yourself, from considerations of your own selfish interest, would willingly and deliberately hazard the risk of giving up forever the safeguard to your life and liberty expressly vouchsafed by the protective provisions thus established as the law of the land, which no legislature and which no majority of the people may ever capriciously set aside. If you happen to feel no selfish need of such protection, then consider the question as one touching your own posterity, or as one concerning the entire citizenship of this republic and those who shall come after them, and at the same time concerning the very integrity of the government under which you and yours, and they and theirs, are to live. Not until you have brought yourself to the conclusion that, not merely one or a few of such limitations, but each and all of them, without exception, are unnecessary and unwise, and that they, each and all, may at any time be disregarded—not until then can you be a consistent supporter of the Judicial Recall. These are questions which are, as is the question here under consideration, finally answered in only one way by any citizen who has calmly considered all the facts pertaining to the issue and whose conclusion is the result of cool, deliberate and impartial judgment.

#### THE INDEPENDENT EXERCISE OF JUDICIAL FUNCTIONS THE SAFEGUARD OF CONSTITUTIONAL SAFEGUARDS.

Our fundamental law makes the enforcement of these constitutional safeguards the primary function of the judiciary, federal and state. As said by Chief Justice Marshall:

“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? \* \* \* A legislative act contrary to the Constitution is not law.”<sup>1</sup>

It is urged by the socialists and by their coadjutors, the advocates of the judicial recall, that this decision by Chief Jus-

<sup>1</sup> Marbury v. Madison, 1 Cranch. 368, 388.



tice Marshall was a usurpation by, or arrogation to, the courts of a power not expressed and never intended to be enforced as a constitutional judicial function. No better answer to this claim can be made than the convincing arguments of Marshall in the case of *Marbury v. Madison*. But that this was the interpretation of the constitution, upon the faith of which more than any other single feature the original states were persuaded to accept it, is shown by the various arguments of Ellsworth, Hamilton and others prior to its adoption. Hamilton urged in the *Federalist*:

“There is no liberty where the power of judging be not separate from the legislative and executive power. \* \* \* The complete independence of the courts of justice is peculiarly essential in a limited constitution. \* \* \* Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the Constitution void.”

Upon the same ground Ellsworth, on January 7th, 1788, urged the ratification of the Constitution upon the Connecticut convention, when he said:

“If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is a usurpation upon the Federal Government, the law is void; and upright independent judges will declare it so.”

With the preservation of the judicial function as so laid down by Marshall, our Constitution was characterized by Gladstone as “the most wonderful work ever struck off at a given time by the brain and purpose of man.” James Bryce, the greatest modern student and authority upon constitutional government, terms ours “as the first true federal state founded on a complete and scientific basis.”<sup>2</sup>

Upon this scientific basis of constitutional government nearly

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<sup>2</sup> “Studies in History and Jurisprudence,” page 392.

all the constitutions since established have been modeled. So the Constitution of the Swiss Federation, enacted in 1848 and amended in 1874; the Constitution of Canada, established by the British North American Act of 1867; the Constitution of the North German Federation in 1866, enlarged into that of the German Empire in 1871; and in 1901 the Constitution adopted by Australia; and subsequently in South Africa. Then there are the federated states in Central and South America, which have been successful to the extent only that the safeguards of their constitutions have been enforced. Mexico has become in fact a government merely of men; for there the law is not supreme. If we intend to replace the supremacy of the law with a government merely of men, with danger of like results, let us follow the judicial recall idea and destroy the protective features of our fundamental law. While among these modern constitutions there is a difference in the application of the judicial function, it is significant, as stated by Prof. Judson, that wherever English law or English traditions prevail, "the tendency is towards the adoption of the American principle of determining by judicial authority the question necessarily involved in the enforcement of the written constitution of a federal state."<sup>3</sup>

#### THE JUDICIAL RECALL IS A RECALL OF CONSTITUTIONAL SAFEGUARDS.

Our constitutional safeguards are, as stated by Marshall,<sup>4</sup> merely "absurd attempts" to provide necessary protection to life, liberty and property, unless there is a recognized power of enforcement. This can be only through the judiciary, federal and state, upon whom, by the express terms of the federal constitution, is enjoined, under oath, the duty of enforcing these protective provisions as the supreme law of the land.<sup>5</sup> This duty cannot be fulfilled except through judges whose independence and freedom from direct attack by local or temporary majorities are assured. This duty cannot be performed if judicial decisions are made subject to appeal before a mass meeting

<sup>3</sup> "The Judiciary and the People" by Frederick N. Judson; Yale University Press, 1913; pp. 78, 81.

<sup>4</sup> *Marbury v. Madison*, 1 Cranch. 368, 388.

<sup>5</sup> U. S. Constitution, Article VI.

of the authors of the legislation passed upon. The Recall of Judges is a direct attack upon their independence, and, therefore, an indirect attack upon constitutional safeguards. The Recall of Decisions is a direct attack upon the essential functions of the judiciary itself. It is a recall of the very keystone feature of our system of government. It is a direct recall of constitutional safeguards. The Decision Recall leaves to the whim or caprice of a local or temporary majority,—not of the entire electorate but of those who take a notion to pass upon the question, which in most instances is a small minority,—not any consistent change or amendment of constitutional law, but the question of its temporary or local suspension or application. It permits and encourages the enforcement of arbitrary, individual or class distinctions. It violates every theory of our system of government. As said by ex-President Taft:

“It is not alone the popular control of laws and executive action that gives a democracy strength and long life. It is its capacity to do justice to the individual and the minority. Lack of this is what destroyed ancient democracies. What preserves ours are those self-imposed popular restraints and practical means for enforcing them that keep the course of the majority of the controlling electorate just to all and each of the people.”<sup>6</sup>

The Judicial Recall is, therefore, repugnant to our system of constitutional democratic government. It is not progressive. It is not constructive. It is not remedial. It is reactionary and destructive. It is subversive of our constitution, of the government established under it, of every element of protection now vouchsafed to our citizens with respect to their lives and their property.

### THE RECALL EPIDEMIC.

Beginning with the local adoption of the Recall of Judges in Oregon in 1908, and followed later by the adoption in California and some other states of similar measures for the Judicial Recall, the movement has become nation-wide. Its significance and dangers are, in many states, underestimated, because here and there, up to the present time, no special local demand

<sup>6</sup> “Popular Government—Its Essence, Its Permanence and Its Perils,” Yale University Press, 1913.

for the Judicial Recall has shown itself. Within the past year, however, the Recall of Judges by popular vote has been proposed by the Kansas legislature for adoption by the people. In Arkansas, a constitutional amendment for the Recall of Judges, initiated by the people, was passed at the 1912 election, but was held by the State Supreme Court not properly submitted and, therefore, not adopted. A constitutional amendment for the Recall of Judges has recently been adopted in the States of Arizona and Nevada. In Colorado a constitutional amendment has been adopted, not only for the Recall of Judges, but also for the Recall of Judicial Decisions. The Minnesota legislature has just proposed for adoption a constitutional amendment providing for the Recall of Judges. In many of the forty or more state legislatures of 1913 measures for constitutional amendments providing for the Judicial Recall were presented, and in some of them, while not successful, received surprisingly strong support. In North Dakota the measure was lost by only one vote.

In the recent Massachusetts legislature a measure was presented and strongly urged authorizing the Recall of Judicial Decisions in all cases when "a law otherwise duly enacted by the legislative authority of the commonwealth shall be held by the Supreme Judicial Court to be in violation of the constitution." In April last there was introduced in the Congress a joint resolution proposing to the states the election of all federal judges by vote of the people, with a tenure of twelve years, and providing for a recall of all judges, both of the supreme court and inferior courts, at any general election at which presidential electors shall be chosen.<sup>7</sup> A senate joint resolution was introduced in December, 1912, proposing a constitutional amendment providing that any decision of the Federal Supreme Court declaring unconstitutional an act of the Congress, may be submitted by the Congress to the electors and that by vote of a majority of congressional districts and of the states, such act should, notwithstanding the decision of the Supreme Court, become a law.<sup>8</sup>

<sup>7</sup> See House Joint Resolution 26, 63rd Cong., 1st Session, introduced April 7, 1913, by Congressman Lafferty.

<sup>8</sup> Senate Joint Resolution 142, 62nd Cong., 3rd Session, introduced December 4, 1912, by Senator Bristow. For status of Judicial Recall in various states, see 1913 Report of American Bar Association Committee to Oppose Judicial Recall.

Under the recent Colorado amendment a supreme court decision declaring unconstitutional any state statute may be made ineffective by a majority of the votes cast by state electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the Judicial Decision Recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide whether in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day, and another way another day, with reference to the same provision. One city might decide one way and at the same time another city another way, with reference to the same provision.

Now, what do you think of the wisdom or sanity of those pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive" methods, as merely "a new method of constitutional amendment by popular vote"?<sup>9</sup>

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a *reductio ad absurdum* of the decision recall argument.

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<sup>9</sup> See Article by Wm. D. Lewis, Dean Pennsylvania Law School, *Annals American Academy of Political and Social Science*, May, 1913. See also, Ex-President Roosevelt's Carnegie Hall Speech, March, 1912, and his other arguments for the Decision Recall.

## HOW THE POISON WORKS.

This nation is now afflicted with a widely spreading plague of misinformation, of a poisoning of the public mind against the very safeguards of our free institutions. A deadly infection works upon the misguided prejudices and discontents of the elements of unrest. This infection is fertilized and spread by certain classes of citizens who have become purveyors of error and all of whom are shouting for the judicial recall. These are, first, certain journalists; next, some sentimental reformers who confound change with progress; then, those who stand in avowed antipathy, social and political, with our form or any form of government; and, last, but not least, the self-exploiting political malcontent whose watchword is to "smash things."

## MUCKRAKING JOURNALISTS.

Muckraking has become among journalists a vocation, even a profession. A once well-known monthly magazine, which some of you may remember even in these days of its obscurity as "Pearson's Magazine," has been exploiting in its columns during the past summer such unwarranted and dastardly attacks upon our federal constitution that it has successfully demonstrated its right to the boast appearing upon its cover page,—that it prints stuff "that others dare not print." Even in this day of sensation-mongers it is probably true that no other publication would have had the effrontery to violate truth, to shock all sense of decency, to the extent that this magazine has done. It ridicules the term "patriot fathers" as applied to the framers of our Constitution. It brands them as "grafters" who initiated and carried through a change in our system of government and framed and established a constitution, upon a plan which "was never meant to bring about rule by the people," but which was adroitly put together and the adoption of which was surreptitiously and deceitfully procured,—all for the sole purpose "to enhance the value of their own property holdings and to tighten and increase the burden of the shackles which theretofore existed upon the liberty of the common peo-

ple." The Constitution of the United States, it says, was made for the people "in the same sense that sheep-shears are made for sheep. The gentlemen who made the constitution had sheep to shear." This is the view presented by a 1913 American journal, and in support of its propositions it indulges in a mess of misinformation and of garbled and distorted citations from authorities.<sup>10</sup>

Another unscrupulous and despicable contributor presented some time ago in another magazine ("Everybody's,"—it should be nobody's) a venomous attack upon the judiciary, in which he traduced individual judges, maligned the courts, and caluminated the entire judicial department by false statements, by subtle innuendos, which undoubtedly brought conviction to the general mass of unthinking readers, but which to any discriminating person brought only the reaction of an intense shock to their sense of decency. The Tennessee Bar may be proud of the manner in which one of its members paid his respects to this "Connolly person" journalist; and if any of you should wish to read in print the sentiments of protest which you felt at the time, I would refer you to Mr. Ewing's speech last year before the Georgia State Bar Association.<sup>11</sup>

### HIGH SCHOOL REFORMERS.

This epidemic of antipathy to established institutions has also spread to the high school, the college of law, and the university. In some instances scholars recognized for their learning and research in history and in the science of government, who even occupy positions as leading members or heads of faculties, have been drawn away from their saner methods of thought, to become by their advocacy of the Judicial Recall allies of the disrupters of our government.<sup>12</sup> The fact that such teachers in their former period of sounder thought have acquired a large clientage of hearers makes their influence for

<sup>10</sup> See Pearson's Magazine, August, 1913.

<sup>11</sup> Articles by C. P. Connolly in February and March, 1912, numbers of Everybody's Magazine; and "The Spirit of the Times" by Mr. Caruthers Ewing of the Memphis bar, annual address before the Georgia State Bar Association, 1912.

<sup>12</sup> See Article by Dean W. D. Lewis, of the Pennsylvania Law School, in Annals, supra; see also "A Government of Men," presidential address by Prof. Albert Bushnell Hart, before the American Political Science Association December 28th, 1912, American Political Science Review, Vol. 7, No. 1, February, 1913.



the spirit of disruption wide and dangerous. The fact that such lapses from sanity on the part of men who are in position to be leaders of thought are exceptional, is counterbalanced by their extreme activity and persistence in error.

Their theories, as novelties, are naturally enticing to the youthful mind. A well-known member of the Ohio bar, in commenting upon the subtle attractiveness and danger of the new theories, wrote to me the other day, urging that these modern, so-called progressive, notions should be met with and argued against as if they were really proposed advances in the science of government. "We have," he said, "too long rested supine in the belief that there was no danger in these attacks upon our system of representative government, with its division of the government into three branches, of courts into two, and a written constitution created to guard minorities against the temporary passions of the majority. The wisdom of all these is challenged to-day; and the bulk of our people, brought up in the safety which these safeguards have afforded, removed by lapse of time from the dangers which caused their enactment, are ignorant of the reason of their well-being." He then continues:

"Indeed, I think it is necessary to go further back in the resistance of these views. I recently attended the graduation exercises of a high school in a nearby municipality, and heard boy after boy deliver orations, and girl after girl read compositions, which betrayed that they had been taught as selfevident truths the incorrectness of all our American views on these subjects. The election of an executive, composed of one or more persons, unhampered by a legislative body, unhampered by any charter or statutory or constitutional restrictions, or by any court interference, was bravely put forth as being selfevidently desirable. They evidently reflected that which they were taught, and accepted the teachings as gospel. They were evidently without any home teaching on the subject. The gentleman who sat by me, a lawyer, father of two of the boys who graduated, was horrorstruck at the principles urged in his sons' orations, principles which he had no idea had been inculcated in the school. \* \* \* I believe that our institutions are now in exceedingly great peril, and that it is incumbent upon all of us to do all that we can to sustain them."

### AN INSTRUMENT OF SOCIALISM.

Then comes that class of Judicial Recall advocates who frankly admit that their social and political creed is to destroy our constitution and our government, and to do away with all rights of private property and to bring about a reign of socialism or of anarchy. It is very significant that this class of agitators are the first organized advocates of the Judicial Recall, which, they say, is to be the means by which they are to bring about disturbances, disruption and disaster to any form of government as such. The modern advocacy of the Judicial Recall measures sprang from socialism. The present socialist labor party was the first political party in America to demand the Recall. The Judicial Recall measures are essentially instruments of socialism.

The leading organ of the socialists—"The Appeal to (T) reason"—speaking of the Judicial Recall, says:

"It is the means whereby the people will be enabled to inaugurate Socialism, and after that is done they may secure democracy in industry."

Its advocates, who are such as Senator Bourne, say that the "chief function" of these measures is to "restore absolute sovereignty of the people" and they define sovereignty as "the supreme ruleship." Now, that is just what the socialists say. It is the socialists' platform which, after the recall plank, urges the abolition of the power of the courts to declare statutes unconstitutional and claims that this power has been "usurped" by the courts. And then, to leave no doubt of what is meant by the socialism which is to be "inaugurated" by means of the Judicial Recall, the same socialist platform declares that these measures

"Are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance."

Referring to the results which must follow upon the application of the Judicial Recall, and particularly of the Decision Recall, Ex-President Taft says:

"To what would this all necessarily lead? To confiscation and then to socialism. Indeed, it is difficult to tell whether the Recall of Judicial Decisions is not as socialistic as it is anarchistic"<sup>13</sup>

Think of these things when you are told that the functions now exercised by our courts are exercised by mere usurpation, and when you are urged to wrest from the courts these powers and turn over to the people the direct adjudication of constitutional questions.

### THE IDIOSYNCRASY OF ROOSEVELT.

The disgruntled malcontents, those filled with greed for position and power, that class so well described by Aristotle,—these also strive for novation and join in the struggle for change simply for the sake of change, regardless of inevitable disaster. Let me read to you that well known description by Aristotle of that sort of man who is an antagonist of restraint, and particularly of constitutional restraint. As I read, note whether it brings to your mind any present-day advocate of the Judicial Recall.

That species of democracy where the people and not the law is supreme is, as stated by Aristotle,

"produced by the influence of the demagogue. \* \* \*  
A democracy of this sort is analagous to a tyranny,  
\* \* \* The demagogues are, by referring everything to the people, the cause of the government being administered by popular majorities, and not according to law, since their power is increased by an increase of the power of the people, whose opinion they command. The demagogues likewise attack (the courts and) the magistrates and say that the people ought to decide; and since the people willingly accept the theory, the power of all the magistrates is destroyed. Accordingly, it seems to have been justly said that a democracy of this sort is not entitled to the name of a constitution, for where the laws are not supreme, there is no constitution."

This description never applied to any man of modern times more fittingly than to that ex-president who fulminates his

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<sup>13</sup> Popular Government, *supra*, page 180.

insidious attacks upon our constitution, sometimes before the public at home, then from the jungles of Africa, and who is now telling the citizens of the South American republics whose governments are modeled upon our own, that our constitutional system of government is wrong and that the prime function of our courts is performed only through usurpation of judicial powers.

Ex-President Roosevelt is not so much to blame for his vagaries. The unfortunate feature of his theatrical propaganda is that he has done many good things and spoken many a wise lesson, and thereby established himself as a prophet among great masses of the people. But he is a prophet gone wrong. He remains, however, even in error, energetic, persistent and resourceful. There are, you know, as recognized by physicians, found now and then persons who have peculiar physical or psychological antipathies. One may be physically incapacitated from assimilating certain foods, or one may be mentally incapable of grasping certain subjects, as, for instance, mathematics. At the same time they may show normal, or even above normal, development and capacity in other lines. Such persons are said to have an "idiosyncrasy" for this or that thing or subject. Now Roosevelt has demonstrated that he is afflicted with an incurable idiosyncrasy for all legal and constitutional questions. This is the only theory upon which we can explain his vacillating, illogical and altogether unsuccessful attempts to reconcile his proposition of the Decision Recall with any practical, effective administration of a constitutional democratic government. He pretends to see in the Decision Recall merely a speedier and more effective method of constitutional amendment; although it is a self-demonstrated fact, shown by theory and by experience, that the Decision Recall means an arbitrary or local suspension or application of constitutional safeguards, without preserving either the elements of principle, of consistency or of equality. He distorts and perverts the teachings of Lincoln and of all the authorities upon the science of government, and misreads and misapplies the decisions of the Federal Supreme Court at the same time that he presumes to cite these as authorities for the fallacy which he supports.

## AN ALLY OF SOCIALISM.

This champion of the Judicial Decision Recall expressly stated in his Carnegie Hall speech in 1912 that the functions as exercised at present by our courts were those to which they were "entitled" under our constitution. But only the other day in his speech at Buenos Ayres he aligned himself with the socialists who advocate the destroying of constitutional safeguards and then the wresting from owners of all holdings of private property. This they justify on the ground, as they say, that the judicial power to enforce those constitutional safeguards was usurped by the courts and that the right of private ownership of property is a right stolen or usurped from the people as a whole; and therefore, they say, the power of enforcement of these safeguards and the right of ownership of private property are a power and right which neither any citizen nor the entire citizenship is bound to respect. In his Buenos Ayres speech Roosevelt supported this doctrine which is the basis of Socialism,—when he said that the power at present exercised by our courts to protect and preserve constitutional safeguards is a power "arrogated" to and usurped by the courts themselves.

His direct attack upon the judiciary is now carried to the extreme of the assertion, also made in his Buenos Ayres speech, that for more than thirty years the courts of this country have exercised their powers with "inexcusable and reckless wantonness on behalf of privilege," and against the interests of the people. This statement is no mere lapse from over enthusiasm, for he assures us that he makes it "gravely and deliberately." We have in him, then, an ex-president preaching Socialism. For this attack upon our judiciary is precisely the same as that which has been continuously for years, and also "gravely and deliberately," made by the Socialists as the basis for their doctrine that the Constitution with all its safeguards should be wiped out. Moreover, the instruments of destruction which they advocate as the most efficient to accomplish this end are precisely the same Judicial Recall measures that are urged by Roosevelt.

## AN EX-PRESIDENT'S "MY REMEDY."

Roosevelt refers to the Decision Recall as a newly discovered remedy,—as "My Remedy,"—although it was thoroughly discussed and unanimously repudiated in the Australian Constitutional Convention ten years before, evidently, he ever heard of it. It was rejected as manifestly inconsistent with and repugnant to a constitutional form of government; and this, too, at the same time that the enlightened and progressive people of that entire continent adopted a constitution modeled in all its essential features upon that of this country.<sup>14</sup>

In an editorial in the Outlook of August 31, 1912, Mr. Roosevelt cites the Legal Essays of James B. Thayer, who, in his lifetime, was professor in the Law School of Harvard University; and implies that Prof. Thayer is authority in favor of the Judicial Decision Recall. He refers to Prof. Thayer as "Dean" Thayer, although Prof. Thayer was never dean. That position, however, is now occupied by Prof. Thayer's son, Ezra Ripley Thayer, who, in a recently published article, which is a most scholarly and convincing discussion, has met and answered all the essential arguments advanced for the Recall of Judicial Decisions and has proven that Mr. Roosevelt has again indulged in an erroneous citation of authority.<sup>15</sup> Dean Thayer says, after reviewing Prof. Thayer's teachings:

"Such things as Mr. Roosevelt's proposal and the state of public feeling from which it sprung are the precise evils against which Mr. Thayer's warnings were directed. \* \* \*

Among the evils which such judicial action brings in its train is suspicion of other decisions involving no such error and needless attacks on our constitutional system to secure ends attainable by means now at hand. These are to be expected from ardent reformers distinguished for courage and acuteness rather than sanity or patience, whose lack of training in the law leaves them unaware of the flexibility and scope of our existing constitutional machinery. \* \* \*

Under the proposed system, the form of a constitutional limitation remains, but it is binding only to such an extent and in favor of such persons as the majority of voters

<sup>14</sup> See address on "Constitution and Courts" by Justice Rousseau A. Burch, of the Kansas Supreme Court, March 30, 1912.

<sup>15</sup> "Recall of Judicial Decisions," by Ezra Ripley Thayer, Dean of the Law School of Harvard University, in Legal Bibliography of March, 1913; published also as S. D. 28, 63rd Cong., 1st Session.

may choose. The citizen thus has no rights which the legislature and the majority acting together are bound to respect."

There is no excuse or necessity in this country for the Recall of Decisions. One of the chief arguments for its adoption is, that there is at present no appeal to the Federal Supreme Court from the decisions of state courts invalidating statutes on the ground that they are repugnant to the federal constitution, but that such appeal lies only when state courts uphold state statutes against the claim that they are unconstitutional. This deficiency, which has been long recognized, can be easily cured by changing the Judiciary Act, which it is within the power of the Congress to do; and such change is favored by the American Bar Association and by lawyers generally.

So far from being new, the Judicial Recall is in fact a mere relic of antiquity, which, whether in the form of arbitrary ostracism, as in ancient Athens, or in the arbitrary power over the judges once exercised by the sovereign in England, has been eliminated as unworkable, dangerous and subversive of the natural and inalienable rights of person and of property recognized and protected in every enlightened government, and in order to vouchsafe which protection the safeguards of our constitution were made express and definite.<sup>16</sup>

#### INSTANCES OF RESULTING ABUSES.

Examples are apparent of the disasters which might result from the application of the Judicial Recall. Take the well known constitutional provision of the federal and all state constitutions that private property shall not be taken for public use without compensation. Under the present system, any statute which had this effect would be declared invalid by the courts. By the Recall of Decisions, this constitutional safeguard could be eliminated by a mere vote of the people at any time and under any circumstances. They could vote if they chose that all railroads, or any particular railroad, that all lands or any particular pieces of land, or that all property or any property

<sup>16</sup> "Legal Antiquities," by Edward J. White, F. H. Thomas Law Book Co., St. Louis, Mo., 1913.



now held in private ownership, could without compensation, be confiscated to the state for general public benefit and even for general distribution,

Take another instance. The Bills of Rights in our constitutions prohibit the interference with the establishment and free exercise of religion. If any community, whether it be a city, county or state, should attempt to place undue restraint or burdens upon one religious sect as against another by a statute acceptable to a majority, such statute would be invalid. Thus, religious liberty is now vouchsafed to every individual and to every community and the preservation of such safeguard is insured so long as constitutional provisions are free from the results of temporary or local prejudice of this or that community. But this protection is swept away by the application of the Judicial Recall. If the constitutional provision may be suspended or disregarded at any time or place, or as to any particular statute, by a mere majority vote, then any locality, where a majority of the voters may happen to be of one religious sect, may pass, either by direct initiative or by their legislature, a statute oppressive of the minority and the same majority by popular vote are given the power to say that the constitutional prohibition shall be ignored as to such statute.

Accordingly, whether it be a question of protection of religious freedom or of the protection of the property or liberty of persons, each and all such provisions may, under the Recall of Decisions, be ignored by the arbitrary will of a local, temporary majority.

These are practical, probable abuses. The possible abuses are unlimited; for the very essence of the proposition is to do away with restraint and with safeguards, and to make the statute-making power identical and coincident with the power to declare its validity and to compel its enforcement.

#### THE FALLIBILITY OF POPULAR MAJORITIES.

The question involved is not whether the courts make mistakes. The question is, Is it safe to deprive the courts of their functions and to turn them over to the direct vote of majorities? Whether it be true or not that the public would be

cautious and discriminating in the exercise of this power, the fatal objection to it is, as well stated by Prof. Judson, "not that the people would necessarily be unwise in its exercise, but because its existence, whether exercised or not, would be fatal to the independence of our judges."<sup>17</sup>

Speaking of the application of the Recall to the Judiciary, President Lowell, of Harvard, an eminent authority upon the history and science of government, says:

"If a judge is intended to render decisions that will be approved by the people at large, then he ought to be recalled if he fails to do so; but if his function is to administer justice without fear or favor, the recall is as much out of place as the decision of lawsuits by a mass meeting of citizens. The laws that he applies ought to be consonant with public opinion, but he ought to decide cases according to his conscience. If he is incompetent, corrupt, or in any way unfit for his high office, he ought to be impeached or removed after trial or hearing."<sup>18</sup>

It is often answered that the good sense of the people at large, as evidenced by their voice at the polls, may be safely relied upon. This was not the judgment of the framers of our constitution; for it was to protect against the probable and possible errors of temporary majorities that safeguards were written into the constitution. Why, up in Minnesota, two years ago, the country members of the legislature caused to be submitted to the voters of the state a constitutional amendment providing that, regardless of population, certain city districts should not be allotted a number of senators in excess of seven. This was known as the "seven senator" measure by which it was intended to discriminate in favor of the country and against the large cities in reapportioning the legislative districts under the last census. The two localities especially attacked were those represented by the two cities of St. Paul and Minneapolis. Nevertheless, at the state election, the seven-senator amendment passed in St. Paul and nearly obtained a majority in Minneapolis. The voters of those two districts were of average intelligence and yet they voted in favor of a measure directed

<sup>17</sup> The Judiciary and the People, *supra*; page 182.

<sup>18</sup> "Public Opinion and Popular Government," by A. Lawrence Lowell, Longmans, Green & Co., New York, 1913, page 148.

especially against them. That it was not adopted by the entire state was due to the mere accident that the country districts happened to vote against it.

In Oregon the attempts at the recall of officers, judicial and executive, have shown that the real motive and purpose of the recall have been based upon sectional or partisan differences, and that, no matter what the formal charges might be, in most instances the real basis of the recall has been a prejudice artificially worked up against the incumbent and the desire of another candidate to take his place.<sup>19</sup> The recall, moreover, is exercised, as shown by the *Weller case* in San Francisco and in other instances, not by a majority, but by a small minority of the voters. This so-called "progressive" measure has brought us back, in all states where the recall has been applied, to the evils experienced in ancient Greece, as described by Aristotle, under the old system of ostracism by popular vote, in exercising which the people "did not look to the interests of the community, but used ostracism for party purposes." As stated by Plutarch<sup>20</sup>:

"The ostracism was instituted not so much to punish the offender as to mitigate and pacify the violence of the envious, who delighted to humble eminent men, and who, by fixing this disgrace upon them, might vent some part of their rancor."

The independence of the judge should not be assailed by making him at any time directly controlled by or answerable to a majority of those who may assume to pass upon him or his decisions. The protective features of our constitution should not be replaced by measures which allow the makers of a statute the privilege of dictating as to its enforcement. Our present system of government by law should not be replaced by a system of government by men. Judges should be the independent servants of the law. Judges and the entire judiciary should be maintained and supported only as servants of the law; their persons, their office and their decisions should be kept free from the influence of passion or prejudice; much more should they be kept free from the arbitrary control of temporary or

<sup>19</sup> "Operation of the Recall in Oregon," by James G. Barnett; *American Political Science Review*, February, 1912.

<sup>20</sup> Life of Themistocles, quoted in White's "Legal Antiquities," *supra*.

local majorities. A judge should be free to act independently, and, as said by Chief Justice Marshall, "with nothing to control him but God and his conscience." He should at all times be free to heed the admonition given by Moses to the Judges of the Israelites:<sup>21</sup>

"Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; *ye shall not be afraid of the face of man*; for the judgment is God's."

Our judges should be left free to live up to the ideal of the just man, who, in the words of Horace,<sup>22</sup>

"Firm in the consciousness of right, disdains, with equanimity, the frowns of a tyrant and the clamors of a mob."

#### CONCLUSION.

In closing, let me say, gentlemen, that I appreciate how little there is in what I have said which is new, or even instructive, to these representative members of your State Bar. As I have said, I am not here to instruct you upon constitutional law. A lawyer instinctively reads or listens to the modern advocacy of the judicial recall with a smile of contempt at the attacks directly or indirectly made upon our system of constitutional government. But the lawyers of this bar and of the bar of the nation have been altogether too content to pass by these attacks with only a smile, and to view the present agitation for the judicial recall as a mere wave of error against which the ultimate good sense of the electorate would insure safety. But the average voter, even the more intelligent voter, absorbed in his every day profession, business or occupation, has, as a rule, not the protection against false doctrines touching our constitutional system which your training as lawyers may have given to you. He has not generally at his command the fund of knowledge, somewhat technical in its nature, with which one having a legal training meets and answers instantly to his own satisfaction the insidious and enticing, but altogether false, statements and innuendoes which are the instruments of the propaganda of this fallacy.

<sup>21</sup> Deut. 1, 17.

<sup>22</sup> Odes, Book III, 3.

The active opposition to this misleading propaganda has been too much limited to the forum of the lawyers. Its expression has been confined too much to the parlance of lawyers. The issues involved have been viewed too much as questions of politics or of the personal policies of advocates. My discussion before you has been not so much to you, as, through you, to the voting citizenship. It is our duty as lawyers to make every voter within our reach realize the subtle menace of the advocacy of the Judicial Recall, to expose the arguments which are advanced in its favor, and to demonstrate in a practical, intelligible way its inadvisability and its dangers to the safeguards which were established to protect the rights of life, liberty and property of every citizen. The arguments which are advanced for the judicial recall, are, as we well know, self-answering. But it avails little that you or I know that. That fact must be known and recognized by the voters. They have a right to know it; and they have a right to know it from you. It is the duty of every one of you, of every one of us, to see to it that the fact be brought home to every voter, that the arguments presented for the judicial recall are pure fallacies, that these measures are not progressive, that they are not remedial, nor constructive, but that they are subversive of every public and private right and interest which our Constitutional Government was established to safeguard.

#### GENERAL NOTE.

A detailed discussion of the arguments for and against the Judicial Recall measures is not here attempted. For further and more full treatment of the question see, in addition to other discussions cited, (1) "The Recall of Judges," address before Minnesota State Bar Association, given June 19, 1911, published as S. D. 649, 62nd Congress, 2nd Session; (2) "The Judicial Recall—A Fallacy Repugnant to Constitutional Government;" in *Annals American Academy of Political and Social Science*, September, 1912; published as S. D. 892, 62nd Congress, 2nd Session; (3) "The Judiciary as the Servant of the People;" address before Tennessee State Bar Association, June 26, 1913; published in pamphlet form for circulation the latter being a revision from the commencement address before the graduating class of the Law School of the University of South Dakota, given at Vermillion, S. D., June 11, 1913.

A useful bibliography on the subject is attached to the 1913 report of the American Bar Association Committee to Oppose the Judicial Recall. Copies of this report, with several representative arguments against the Judicial Recall by President Butler, Dean Thayer, William Hornblower, Senator Sutherland, and others, will, on request, be mailed to any address by the Chairman of the Committee, 1006 Met. Life Bldg., Minneapolis, Minn.

For references to arguments both for and against, with extensive bibliography, see the "Recall" number of *Debaters' Handbook Series*, compiled by E. M. Phelps, published 1913, by H. W. Wilson & Co., White Plains, N. Y., formerly of Minneapolis, Minn.







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# The Election of Judicial Judgments

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Address Before the Denver, Colorado, Bar  
Association, February 21, 1914

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By  
Rome G. Brown,  
Minneapolis, Minnesota.

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# The Election of Judicial Judgments

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Minneapolis, Minnesota

*Lady and Gentlemen of the Denver Bar:*

Among the once obsolete laws and customs which history shows to have been recognized in the governments of ancient nations, monarchial and democratic, there was no class of laws or customs more abusive as instruments of oppression than those through which the *conscience* of the judge as a spokesman of the law was eliminated as the primary controlling force with respect to the exercise of his judicial functions. The history of the advance of civilization has been the history of the emergence of the judicial conscience from the malignant influence of oppressive interference. The efficacy of governments in promoting the general welfare of their citizenship has always varied with the protection given to the independence of judges in the rendition of their judgments, and with the degree of assurance that judicial judgments, subject to review only by appellate courts, should be accepted as final and as such enforced.

In the oldest code of laws known, the code of Hammurabi, King of Babylon over 2,000 years before the Christian era, it was the prerogative of the king, as sovereign, either to send to the judges, in advance, his own decision of the case, or simply to send the case to them for trial. After rendition of judgment the sovereign assumed the power to compel a modification or a retraction of the decision; and the judge who, without his sovereign's consent, attempted any change or variation or who did not heed the will of his sovereign with respect to such judgment, was subject to the severest penalties, including his expulsion from the bench. Both the judge and his decisions were subject to recall by the arbitrary, capricious interference of the sovereign power. This was the practice under the same code

of laws which punished the surgeon by removing the hand that performed an unsuccessful operation.<sup>1</sup>

In the pure democracy of ancient Rome, not only the judges themselves but each and all of their actions, whether personal or as part of the exercise of their judicial functions, upon charges circulated among the people, were triable in the forum of the ballot;—that is, the judges personally and their judgments were always subject to a referendum election by popular ballot. The ostracism of the ancient Grecian democracy and the petalism of the ancient Syracusans differed only in the fact that in one the ballot was a writing upon a shell, and in the other a writing upon a leaf. These customs by which the judicial recall was exercised in those democracies emerged, under the Roman Republic, in the form of the *Judicia Publica* by which judges and their decisions might under the arbitrary caprice and temporary passion of the majority of those who happened to pass upon the question, be repudiated; the judges, by banishment or death; their acts and decisions, by the vote of the referendum ballot. This arbitrary interference by election with judges and their judgments made them simply the servile tools for enforcing, not the law with consistency, equality and justice, but the passion, caprice and tyrannic will of the sovereign. If sovereignty vested in one person or a few, it constituted a tyranny of monarchy. If it vested in the people, it constituted a tyranny of democracy. In both cases the judicial department was maintained, not as an instrument of protection, under the law, of individual rights of liberty and of property, which is the prime function of a judiciary. On the contrary, it was made the instrument of oppression.

It was not until the judicial office was freed from this compulsory servility and clothed with the dignity and independence, without which it can never command respect or have any efficacy, that modern, civilized government began. This transition from comparative barbarism in governmental affairs, from the tyrannies of monarchy and of democracy which brought disgrace and disaster to the governments of old, to an enlightened recognition by all classes of the necessity of a re-establish-

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<sup>1</sup> "Legal Antiquities" by Edward J. White; published 1913 by F. H. Thomas Law Book Co., St. Louis.

ment of the judicial function, began when the English people wrested our Bill of Rights from King John, at Runnymede. But that was only the first step; for it took centuries to bring home to the advancing English civilization the fact that Bills of Rights, no matter how assertive of the inalienable rights of the individual against the injustice and oppressions of the tyranny of arbitrary control, were futile to effect protection without the independence of that department by the proper exercise of whose functions they might be *enforced*. Such power of enforcement was lacking until the beginning of the 18th century; because, prior to that time, the English sovereign reserved and exercised the power of arbitrary recall of any judge, and judicial judgments were subject to the election of the sovereign. The statute of William III, however, enacted nearly a century before the adoption of our federal constitution, established in English jurisprudence the principle that the members of the judiciary, during the term of office for which they were selected, should be independent judges of the law and not the servile tools of either a monarchical or popular sovereignty; that their judgments when rendered should be *enforced* as the law, at least as the law of the case; and that their recall or that of their judgments should not be accomplished by hue and cry spread among the people to influence the results of a referendum election, the possibility of which, if recognized by law, always stands as a menace to the justness and independence of the judge and of his judgments.

#### THE UNFETTERING OF THE JUDICIAL CONSCIENCE.

It took centuries even to begin this revolt from barbarism. It took still further centuries to establish the principle of an independent judiciary as a requisite to the most enlightened system of jurisprudence ever known in the history and science of government. In the two centuries following, it was by the enforcement of this principle that meaning and efficacy were given to the fundamental doctrines of individual liberty embodied in the same Bills of Rights which are written into our own federal constitution, and made, by the same instrument, the supreme law of the land controlling upon all judges, state and

federal; and which have become also a part of every state constitution since formulated.

It was under this establishment of effective protection, not merely theoretical protection, of the individual and of the minority against the arbitrary caprice and oppression of local or temporary majorities, that has made stability, efficiency, security of life, liberty and property of persons and of minorities, prosperity and enlightenment of its citizens, the characteristic features of the government of this the greatest republic in the world's history. It is these scientific, practical and effective features of our system of government which have made it the model for all modern governmental reorganizations and have made our constitution and the government administered under it the object of admiration and even marvel of the students of the science of government. Gladstone characterized our constitution as expounded by Marshall, "The most wonderful work ever struck off at a given time by the brain and purpose of man." Bryce, the greatest modern student and authority upon constitutional government, terms ours, as "the first true federal state founded on a complete and scientific basis."<sup>2</sup>

The question today, which is involved in the propositions of judicial recall, whether in the form of recall of judges or judicial decisions, is not merely, whether we shall change our form of government. The issue is a more vital one and more far-reaching. The issue is between our system of constitutional democracy on the one hand and, upon the other hand, a government from which all constitutional protection is eliminated. The question is, shall we, disregarding all the lessons of experience and sacrificing all the advantage which has been slowly acquired through centuries of real progress in the science of government, weaken or eliminate constitutional protection. Shall we give up the principles of our Bill of Rights by destroying the power established for their enforcement. Shall we give up all these safeguards and return to the unscientific and now discredited systems, from which we have been slowly departing since the time of King John? Shall we replace our present constitutional democracy with a democracy which has no enforceable Bill of Rights; which has no stable, sure, consistent or

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<sup>2</sup> Studies in History of Jurisprudence; see also Carnegie's "Triumphant Democracy."

equally administered constitutional protection for the individual as to his life, liberty or property?

All this we do as soon as we consent to subject judicial judgments to a referendum election.

### THE SAFEGUARDS DESTROYED BY THE RECALL.

Read the Bill of Rights in the federal constitution or in the constitution of any of our states. Read the federal fourteenth amendment. Note the limitations upon the legislative power of congress or of the states, prohibiting statutory infringement of the rights of person and of property, protecting the liberty of contract and the sacredness of the obligation of contract and prohibiting unjust and arbitrary class distinctions.

Consider these and other limitations. Take any one of them, and as an individual, ask yourself seriously the question whether you, yourself, from considerations of your own selfish interest, would willingly and deliberately hazard the risk of giving up forever the safeguard to your life and liberty expressly vouchsafed by the protective provisions thus established as the law of the land, which no legislature and which no majority of the people may ever capriciously set aside. If you happen to feel no selfish need of such protection, then consider the question as one touching your own posterity, or as one concerning the entire citizenship of this republic and those who shall come after them, and at the same time concerning the very integrity of the government under which you and yours, and they and theirs, are to live. Not until you have brought yourself to the conclusion that, not merely one or a few of such limitations, but each and all of them, without exception, are unnecessary and unwise, and that they, each and all, may at any time be disregarded—not until then can you be a consistent supporter of the Judicial Recall. These are questions which are, as is the question here under consideration, finally answered in only one way by any citizen who has calmly considered all the facts pertaining to the issue and whose conclusion is the result of cool, deliberate and impartial judgment.



## THE INDEPENDENT EXERCISE OF JUDICIAL FUNCTIONS THE SAFEGUARD OF CONSTITUTIONAL SAFEGUARDS.

Our fundamental law makes the enforcement of these constitutional safeguards the primary function of the judiciary, federal and state. As said by Chief Justice Marshall:

“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? \* \* \* A legislative act contrary to the Constitution is not law.”<sup>3</sup>

It is urged by the socialists and by their coadjutors, the advocates of the judicial recall, that this decision by Chief Justice Marshall was a usurpation by, or arrogation to, the courts of a power not expressed and never intended to be enforced as a constitutional judicial function. No better answer to this claim can be made than the convincing arguments of Marshall in the case of *Marbury v. Madison*. But that this was the interpretation of the constitution, upon the faith of which more than any other single feature the original states were persuaded to accept it, is shown by the various arguments of Ellsworth, Hamilton and others prior to its adoption. Hamilton urged in the *Federalist*:

“There is no liberty where the power of judging be not separate from the legislative and executive power. \* \* \* The complete independence of the courts of justice is peculiarly essential in a limited constitution. \* \* \* Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the Constitution void.”

Upon the same ground Ellsworth, on January 7th, 1788, urged the ratification of the Constitution upon the Connecticut convention, when he said:

“If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if

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<sup>3</sup> *Marbury v. Madison*, 1 Cranch. 368, 388.

they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, if they make a law which is a usurpation upon the Federal Government, the law is void; and upright independent judges will declare it so."

Upon this scientific basis of constitutional government nearly all the constitutions since established have been modeled. So the Constitution of the Swiss Federation, enacted in 1848 and amended in 1874; the Constitution of Canada, established by the British North American Act of 1867; the Constitution of the North German Federation in 1866, enlarged into that of the German Empire in 1871; and in 1901 the Constitution adopted by Australia; and subsequently in South Africa. Then there are the federated states in Central and South America, which have been successful to the extent only that the safeguards of their constitutions have been enforced. Mexico has become in fact a government merely of men; for there the law is not supreme. If we intend to replace the supremacy of the law with a government merely of men, with danger of like results, let us follow the judicial recall idea and destroy the protective features of our fundamental law. While among these modern constitutions there is a difference in the application of the judicial function, it is significant, as stated by Prof. Judson, that wherever English law or English traditions prevail, "the tendency is towards the adoption of the American principle of determining by judicial authority the question necessarily involved in the enforcement of the written constitution of a federal state."<sup>4</sup>

#### THE JUDICIAL RECALL IS A RECALL OF CONSTITUTIONAL SAFEGUARDS.

Our constitutional safeguards are, as stated by Marshall,<sup>5</sup> merely "absurd attempts" to provide necessary protection to life, liberty and property, unless there is a recognized power of enforcement. This can be only through the judiciary, federal

<sup>4</sup> "The Judiciary and the People" by Frederick N. Judson; Yale University Press, 1913; pp. 78, 81.

<sup>5</sup> *Marbury v. Madison*, 1 Cranch. 368, 388.

and state, upon whom, by the express terms of the federal constitution, is enjoined, under oath, the duty of enforcing these protective provisions as the supreme law of the land.<sup>6</sup> This duty cannot be fulfilled except through judges whose independence and freedom from direct attack by local or temporary majorities are assured. This duty cannot be performed if judicial decisions are made subject to appeal before a mass meeting of the authors of the legislation passed upon. The Recall of Judges is a direct attack upon their independence, and, therefore, an indirect attack upon constitutional safeguards. The Recall of Decisions is a direct attack upon the essential functions of the judiciary itself. It is a recall of the very keystone feature of our system of government. It is a direct recall of constitutional safeguards. The Decision Recall leaves to the whim or caprice of a local or temporary majority,—not of the entire electorate but of those who take a notion to pass upon the question, which in most instances is a small minority,—not any consistent change or amendment of constitutional law, but the question of its temporary or local suspension or application. It permits and encourages the enforcement of arbitrary, individual or class distinctions. It violates every theory of our system of government. As said by ex-President Taft:

“It is not alone the popular control of laws and executive action that gives a democracy strength and long life. It is its capacity to do justice to the individual and the minority. Lack of this is what destroyed ancient democracies. What preserves ours are those self-imposed popular restraints and practical means for enforcing them that keep the course of the majority of the controlling electorate just to all and each of the people.”<sup>7</sup>

The Judicial Recall is, therefore, repugnant to our system of constitutional democratic government. It is not progressive. It is not constructive. It is not remedial. It is reactionary and destructive. It is subversive of our constitution, of the government established under it, of every element of protection now vouchsafed to our citizens with respect to their liberty and their property.

<sup>6</sup> U. S. Constitution, Article VI.

<sup>7</sup> “Popular Government—Its Essence, Its Permanence and Its Perils;” Yale University Press, 1913.

### THE RECALL EPIDEMIC.

Beginning with the local adoption of the Recall of Judges in Oregon in 1908, and followed later by the adoption in California and some other states of similar measures for the Judicial Recall, the movement has become nation-wide. Its significance and dangers are, in many states, underestimated, because here and there, up to the present time, no special local demand for the Judicial Recall has shown itself. Within the past year, however, the Recall of Judges by popular vote has been proposed by the Kansas legislature for adoption by the people. In Arkansas, a constitutional amendment for the Recall of Judges, initiated by the people, was passed at the 1912 election, but was held by the State Supreme Court not properly submitted and, therefore, not adopted. A constitutional amendment for the Recall of Judges has recently been adopted in the States of Arizona and Nevada. In Colorado a constitutional amendment has been adopted, not only for the Recall of Judges, but also for the Recall of Judicial Decisions. The Minnesota legislature has just proposed for adoption a constitutional amendment providing for the Recall of Judges. In many of the forty or more state legislatures of 1913 measures for constitutional amendments providing for the Judicial Recall were presented, and in some of them, while not successful, received surprisingly strong support. In North Dakota the measure was lost by only one vote.

In the recent Massachusetts legislature a measure was presented and strongly urged authorizing the Recall of Judicial Decisions in all cases when "a law otherwise duly enacted by the legislative authority of the commonwealth shall be held by the Supreme Judicial Court to be in violation of the constitution." In April last there was introduced in the Congress a joint resolution proposing to the states the election of all federal judges by vote of the people, with a tenure of twelve years, and providing for a recall of all judges, both of the supreme court and inferior courts, at any general election at which presidential electors shall be chosen.<sup>8</sup> A senate joint resolution was introduced in December, 1912, proposing a con-

<sup>8</sup> See House Joint Resolution 26, 63rd Cong., 1st Session, introduced April 7, 1913, by Congressman Lafferty.

stitutional amendment providing that any decision of the Federal Supreme Court declaring unconstitutional an act of the Congress, may be submitted by the Congress to the electors and that by vote of a majority of congressional districts and of the states, such act should, notwithstanding the decision of the Supreme Court, become a law.<sup>9</sup>

#### AN AD HOMINEM ARGUMENT.

An ad hominem argument is fair when it is used to illustrate general principles and is not forced merely to compel a biased decision in a particular instance. If you meet some person of fair intelligence who thinks he is committed to the recall of judicial decisions, bring home to him just what it means. I will guarantee that you will make a convert in nine cases out of ten. Put this question to him:

“If running out of a building to hasten to a train, you, though innocent of any crime, were apprehended as a criminal fleeing from some offense which happened to have been committed just before by somebody else. Suppose then you were given the choice of having your guilt or innocence determined either (1) by the judicial tribunal established for that purpose, with the privilege of producing evidence and of cross examining the witnesses against you, or (2) by a mass meeting of the people of a particular precinct, or ward or city, where your accusers would not only have a vote but would be free, with impunity, before and at and after the mass meeting hearing, to present their prejudiced, distorted impressions in any form and to any extent that they chose; the final verdict in the first instance to be by trained triers of fact and of law, and in the second instance by mere majority vote of those who happened to be present at the mass meeting?”

Or, apply this same inquiry into a civil proceeding:

“Your residence lot and buildings in the city in which you live are forcibly taken from you, in whole or in part, by the city government, for a public park, under a statute or ordinance purporting to authorize such confiscation without compensation. You seek redress through damages

<sup>9</sup> Senate Joint Resolution 142, 62nd Cong., 3rd Session, introduced December 4, 1912, by Senator Bristow. For status of Judicial Recall in various states, see 1913 Report of American Bar Association Committee to Oppose Judicial Recall.

or injunction or both. Would you prefer to have your lawsuit decided by a court as now established and under the forms of procedure and law as now recognized; or would you prefer to be compelled to leave the verdict to a mere mass meeting of citizens of the precinct or of the ward or of the city in which you live? More than that, if the court had tried the case and made a decree restoring to you your property or allowing you fair damages, and in doing so had declared the statute or ordinance which in terms gave the city the power to take away your property without compensation, unconstitutional, would you prefer that the questions of constitutional law involved be decided by the courts or that those questions be submitted to and finally decided by a vote of a mass meeting and then only by the majority of those who happened to attend such meeting?"

There is no intelligent man who would not immediately answer that the mass meeting decision of the issues of law and fact in both the criminal and civil cases and that the mass meeting review of the application of the constitutional provisions, which had protected him in his property rights,—were each and all unthinkable.

What is sauce for the goose is sauce for the gander; and, if he is consistent, he must, as soon as he recognizes the viciousness of the judicial recall as applied to his affairs, shrink from the thought of its application in any case. He has become a convert from this heresy against constitutional government.

### THE RECALL IN COLORADO.

And yet, you have here today in Colorado that same system of decision and of the review of decisions, the very contemplation of which brings only a shock, a shudder of abhorrence to any person who can and will appreciate its real significance. And let me say that the courts of this state deserve to be subjected to this humiliation—to which they even more than the general citizenship is subjected by these subversive innovations,—if they refuse or even hesitate to assert, at every opportunity, their conscientious convictions with regard to the repugancy of your judicial recall constitutional amendments, and of any legislation under them, to the express prohibition of the federal



constitution and to the fundamental principles of our system of constitutional government.

Your state has set the goal, not in the march of progress but in the retreat of retrogression, far back of the point set by any other state. Some other states have also made retreats to some extent from the general onward movement of the nation's progress, by establishing the recall of judges. Other states may yet fall back. But the general advancement which has been marked by the steady progress of our nation in science, in industry, in prosperity, in the incentive to the development of communities and of individuals afforded by the feeling of security of freedom from oppression and of the stability of our institutions,—this general advancement will persist. It may be handicapped for a time by the retrogressive policies or lack of policies of particular communities, but ultimately the fact will be everywhere recognized that change does not necessarily mean progress; and that rules of conduct, which cannot be arbitrarily set aside to suit the individual or majority passion or caprice, are as essential to the administration of popular government as they are to guide and preserve the morality of the individual in his social relations.

Under the recent Colorado amendment a supreme court decision declaring unconstitutional any state statute may be made ineffective by a majority of the votes cast by state electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the Judicial Decision Recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide wheth-



er in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day, and another way another day, with reference to the same provision. One city might decide one way and at the same time another city another way, with reference to the same provision.

Now, what do you think of the wisdom or sanity of those pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive" methods, as merely "a new method of constitutional amendment by popular vote"?<sup>10</sup>

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a *reductio ad absurdum* of the decision recall argument.

#### THE COLORADO DECISION RECALL AMENDMENT IS VOID.

It is not for me to discuss the workings of the conscience of any person, whether he be judge or lawyer. I can, however, speak for myself. My deliberate, conscientious conviction, as a lawyer, is that the Colorado Decision Recall amendment is void, as being repugnant to the Federal constitution. This conviction is based upon the following self-evident propositions:

1. The prohibitions of the Federal constitution, that no state shall pass or enforce any law impairing the obligation of contracts or contrary to the Fourteenth Amendment, depriving any person of his life, liberty or property without due process of law, or denying to him the equal protection of the laws, are the supreme law of the land; and, as such, are expressly made binding upon the conscience and judgment of every court and of every judge of every court, federal and state. Moreover, every executive officer and judge, federal and state, as well as every citizen, is bound by express oath, required by the Federal constitution, to observe and obey at all times those prohibitions, not only in their private but also in their official actions.<sup>11</sup>

<sup>10</sup> See Article by Wm. D. Lewis, Dean Pennsylvania Law School, *Annals American Academy of Political and Social Science*, May, 1913. See also, Ex-President Roosevelt's Carnegie Hall Speech, March, 1912, and his other arguments for the Decision Recall.

<sup>11</sup> Article VI, Federal Constitution.

2. The "law" of the State which is thereby prohibited includes not only legislative enactments, but also State constitutional provisions; and in case of such contravention, a State constitutional provision, as well as a State statute, must be held void.<sup>12</sup>

As stated by the United States Supreme Court:<sup>13</sup>

"Upon the adoption of the Fourteenth Amendment, *whatever their own constitutions may have been, or have subsequently declared*, the states became bound, as was the United States by the Fifth Amendment, not to deprive any person of property without due process of law."

3. Now, at present in Colorado, if a State statute or a certain city charter provision, when applied to a particular case, is found to contravene the Federal constitution and is for that reason in that case declared by your highest court to be unconstitutional, the Federal constitution leaves open at the present time no alternative, except the *enforcement* of that decision as so rendered. No other alternative is open, except in contravention of the Federal constitution, either to the executive department of the State, to the legislative department, or to the judicial department. Neither is any other alternative left open to the voters of the State, much less to the voters of any municipal division of the State. The final arbiter, under the Federal constitution, so far as the State is concerned, is the highest court of that State. Such decision cannot now be reviewed even by the Federal Supreme Court, although it is within the power of Congress to exercise its constitutional authority to make such decision the subject of Federal review, just as now it would have been reviewable if it had declared the statute or ordinance in question constitutional.

4. Except in repugnance to the Federal constitution, the State cannot give to the governor or other executive officer the arbitrary power of veto upon such decision. Likewise, it cannot give such arbitrary power of veto to the legislature, nor to any body of citizens, nor to the citizens as a whole, either of the State or of any municipality.

<sup>12</sup> *Bigelow v. Draper*, 6 N. D., 152.

<sup>13</sup> *S. W. Oil Co. v. Texas*, 217 U. S., 114, 119.

5. The decision recall, as contemplated in this State, is not a judicial review. It has neither the form nor substance, to any degree, of an *adjudication* of the constitutional question involved in the decision to which it is applied. It is neither in form or substance an amendment, even of the State constitution. It cannot affect, in any degree, the force of the Federal prohibitions, nor of their necessary application to the particular case in which the decision in question is rendered.

6. The annulment of such decision, or the prevention of enforcement of such decision, by the ballot at a referendum election is not a judicial review nor an adjudication. It is nothing more than a mere arbitrary veto by the ballot. It applies only to a particular decision in a particular case. Therefore, it is an arbitrary suspension, as to that decision and case, of the provision of the Federal constitution which the decision has declared to be infringed in that case by the statute or ordinance in question.

7. It is not within the power of the State, under the Federal constitution, to pass and enforce any law, constitutional or legislative, which thus gives to the voters of the State, much less when it gives to the voters of a municipality of that State, either the arbitrary veto of a final decision of the highest court of the State, or the power of arbitrary suspension, within the locality affected, of the Federal supreme law, as to the particular case in question.

8. Therefore, in any case of its attempted application, the Colorado constitutional amendment cannot, by an arbitrary ballot veto, prevent the enforcement of the decision. Moreover, the amendment which pretends to delegate such power to the ballot is in itself void.

9. Therefore, also, it is the duty of any executive officer and of any court to enforce the decision as rendered by the highest court of the State, regardless of any attempted exercise of the arbitrary veto by the ballot at any referendum election, and, as a ground for such enforcement, to hold and declare the provision for such veto—that is, the state constitution decision recall

amendment—absolutely void.

The same reasoning applies to that peculiar constitutional provision of this State forbidding certain courts from declaring in any case that a statute or ordinance is unconstitutional when such statute or ordinance contravenes the Federal constitution. The function and duty of every State judge, whether of an appellate or a nisi prius court, is fixed by the terms of the Federal constitution, and by his oath under that constitution. It compels him in every instance when he deems a law, as applied to the case before him, to contravene the supreme Federal law, *so to declare*, and in accordance with such holding to render his judgment or decree. That duty, imposed by the Federal supreme law, cannot be abrogated or diminished by State enactment, whether by constitutional amendment or by legislative statute.

### HOW THE POISON WORKS.

This nation is now afflicted with a widely spreading plague of misinformation, of a poisoning of the public mind against the very safeguards of our free institutions. A deadly infection works upon the misguided prejudices and discontents of the elements of unrest. This infection is fertilized and spread by certain classes of citizens who have become purveyors of error and all of whom are shouting for the judicial recall. These are, first, certain journalists; next, some sentimental reformers who confound change with progress; then, those who stand in avowed antipathy, social and political, with our form or any form of government; and, last, but not least, the self-exploiting political malcontent whose watchword is to "smash things."

### MUCKRAKING JOURNALISTS.

Muckraking has become among journalists a vocation, even a profession. A once well-known monthly magazine, which some of you may remember even in these days of its obscurity as "Pearson's Magazine," has been exploiting in its columns during the past summer such unwarranted and dastardly at-

tacks upon our federal constitution that it has successfully demonstrated its right to the boast appearing upon its cover page,—that it prints stuff “that others dare not print.” Even in this day of sensation-mongers it is probably true that no other publication would have had the effrontery to violate truth, to shock all sense of decency, to the extent that this magazine has done. It ridicules the term “patriot fathers” as applied to the framers of our Constitution. It brands them as “grafters” who initiated and carried through a change in our system of government and framed and established a constitution, upon a plan which “was never meant to bring about rule by the people,” but which was adroitly put together and the adoption of which was surreptitiously and deceitfully procured,—all for the sole purpose “to enhance the value of their own property holdings and to tighten and increase the burden of the shackles which theretofore existed upon the liberty of the common people.” The Constitution of the United States, it says, was made for the people “in the same sense that sheep-shears are made for sheep. The gentlemen who made the constitution had sheep to shear.” This is the view presented by a 1913 American journal, and in support of its propositions it indulges in a mess of misinformation and of garbled and distorted citations from authorities.<sup>14</sup>

Another unscrupulous and despicable contributor presented some time ago in another magazine (“Everybody’s,”—it should be nobody’s) a venomous attack upon the judiciary, in which he traduced individual judges, maligned the courts, and caluminated the entire judicial department by false statements, by subtle innuendos, which undoubtedly brought conviction to the general mass of unthinking readers, but which to discriminating persons brought only the reaction of an intense shock to their sense of decency. The Tennessee Bar may be proud of the manner in which one of its members paid his respects to this “Connolly person” journalist; and if any of you should wish to read in print the sentiments of protest which you felt at the time, I would refer you to Mr.

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<sup>14</sup> See Pearson's Magazine, August, 1913.

Ewing's speech last year before the Georgia State Bar Association.<sup>15</sup>

### HIGH SCHOOL REFORMERS.

This epidemic of antipathy to established institutions has also spread to the high school, the college of law, and the university. In some instances scholars recognized for their learning and research in history and in the science of government, who even occupy positions as leading members or heads of faculties, have been drawn away from their saner methods of thought, to become by their advocacy of the Judicial Recall allies of the disrupters of our government.<sup>16</sup> The fact that such teachers in their former period of sounder thought have acquired a large clientage of hearers makes their influence for the spirit of disruption wide and dangerous. The fact that such lapses from sanity on the part of men who are in position to be leaders of thought are exceptional, is counterbalanced by their extreme activity and persistence in error.

Their theories, as novelties, are naturally enticing to the youthful mind. A well-known member of the Ohio bar, in commenting upon the subtle attractiveness and danger of the new theories, wrote to me the other day, urging that these modern, so-called progressive, notions should be met with and argued against as if they were really proposed advances in the science of government. "We have," he said, "too long rested supine in the belief that there was no danger in these attacks upon our system of representative government, with its division of the government into three branches, of courts into two, and a written constitution created to guard minorities against the temporary passions of the majority. The wisdom of all these is challenged to-day; and the bulk of our people, brought up in the safety which these safeguards have afforded, removed by lapse of time from the dangers which caused their enactment, are ignorant of the reason of their well-being." He then continues:

<sup>15</sup> Articles by C. P. Connolly in February and March, 1912, numbers of Everybody's Magazine; and "The Spirit of the Times" by Mr. Caruthers Ewing of the Memphis bar, annual address before the Georgia State Bar Association, 1912.

<sup>16</sup> See Article by Dean Lewis, of the Pennsylvania Law School, in *Annals*, supra; see also "A Government of Men," presidential address by Prof. Albert Bushnell Hart, before the American Political Science Association December 28th, 1912, *American Political Science Review*, Vol. 7, No. 1, February, 1913.

"Indeed, I think it is necessary to go further back in the resistance of these views. I recently attended the graduation exercises of a high school in a nearby municipality, and heard boy after boy deliver orations, and girl after girl read compositions, which betrayed that they had been taught as selfevident truths the incorrectness of all our American views on these subjects. The election of an executive, composed of one or more persons, unhampered by a legislative body, unhampered by any charter or statutory or constitutional restrictions, or by any court interference, was bravely put forth as being selfevidently desirable. They evidently reflected that which they were taught, and accepted the teachings as gospel. They were evidently without any home teaching on the subject. The gentleman who sat by me, a lawyer, father of two of the boys who graduated, was horrorstruck at the principles urged in his sons' orations, principles which he had no idea had been inculcated in the school. \* \* \* I believe that our institutions are now in exceedingly great peril, and that it is incumbent upon all of us to do all that we can to sustain them."

#### AN INSTRUMENT OF SOCIALISM.

Then comes that class of Judicial Recall advocates who frankly admit that their social and political creed is to destroy our constitution and our government, and to do away with all rights of private property and to bring about a reign of socialism or of anarchy. It is very significant that this class of agitators are the first organized advocates of the Judicial Recall, which, they say, is to be the means by which they are to bring about disturbances, disruption and disaster to any form of government as such. The modern advocacy of the Judicial Recall measures sprang from socialism. The present socialist labor party was the first political party in America to demand the Recall. The Judicial Recall measures are essentially instruments of socialism.

The leading organ of the socialists—"The Appeal to (T)reason"—speaking of the Judicial Recall, says:

"It is the means whereby the people will be enabled to inaugurate Socialism, and after that is done they may secure democracy in industry."



Its advocates, who are such as Senator Bourne, say that the "chief function" of these measures is to "restore absolute sovereignty of the people" and they define sovereignty as "the supreme ruleship." Now, that is just what the socialists say. It is the socialists' platform which, after the recall plank, urges the abolition of the power of the courts to declare statutes unconstitutional and claims that this power has been "usurped" by the courts. And then, to leave no doubt of what is meant by the socialism which is to be "inaugurated" by means of the Judicial Recall, the same socialist platform declares that these measures

"Are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance."

Referring to the results which must follow upon the application of the Judicial Recall, and particularly of the Decision Recall, Ex-President Taft says:

"To what would this all necessarily lead? To confiscation and then to socialism. Indeed, it is difficult to tell whether the Recall of Judicial Decisions is not as socialistic as it is anarchistic."<sup>17</sup>

Think of these things when you are told that the functions now exercised by our courts are exercised by mere usurpation, and when you are urged to wrest from the courts these powers and turn over to the people the direct adjudication of constitutional questions.

#### THE IDIOSYNCRASY OF ROOSEVELT.

The disgruntled malcontents, those filled with greed for position and power, that class so well described by Aristotle,—these also strive for novation and join in the struggle for change simply for the sake of change, regardless of inevitable disaster. Let me read to you that well known description by Aristotle of that sort of man who is an antagonist of restraint, and particularly of constitutional restraint. As I

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<sup>17</sup> Popular Government, *supra*, page 180.

read, note whether it brings to your mind any present-day advocate of the Judicial Recall.

That species of democracy where the people and not the law is supreme is, as stated by Aristotle,

“produced by the influence of the demagogue. \* \* \*  
A democracy of this sort is analagous to a tyranny,  
\* \* \* The demagogues are, by referring everything to the people, the cause of the government being administered by popular majorities, and not according to law, since their power is increased by an increase of the power of the people, whose opinion they command. The demagogues likewise attack (the courts and) the magistrates and say that the people ought to decide; and since the people willingly accept the theory, the power of all the magistrates is destroyed. Accordingly, it seems to have been justly said that a democracy of this sort is not entitled to the name of a constitution, for where the laws are not supreme, there is no constitution.”

This description never applied to any man of modern times more fittingly than to that ex-president who fulminates his insidious attacks upon our constitution, sometimes before the public at home, then from the jungles of Africa, and who is now telling the citizens of the South American republics whose governments are modeled upon our own, that our constitutional system of government is wrong and that the prime function of our courts is performed only through usurpation of judicial powers.

Ex-President Roosevelt is not so much to blame for his vagaries. The unfortunate feature of his theatrical propaganda is that he has done many good things and spoken many a wise lesson, and thereby established himself as a prophet among great masses of the people. But he is a prophet gone wrong. He remains, however, even in error, energetic, persistent and resourceful. There are, you know, as recognized by physicians, found now and then persons who have peculiar physical or psychological antipathies. One may be physically incapacitated from assimilating certain foods, or one may be mentally incapable of grasping certain subjects, as, for instance, mathematics. At the same time they may show normal, or even above normal, development and capacity in other lines.

Such persons are said to have an "idiosyncrasy" for this or that thing or subject. Now Roosevelt has demonstrated that he is afflicted with an incurable idiosyncrasy for all legal and constitutional questions. This is the only theory upon which we can explain his vacillating, illogical and altogether unsuccessful attempts to reconcile his proposition of the Decision Recall with any practical, effective administration of a constitutional democratic government. He pretends to see in the Decision Recall merely a speedier and more effective method of constitutional amendment; although it is a self-demonstrated fact, shown by theory and by experience, that the Decision Recall means an arbitrary or local suspension or application of constitutional safeguards, without preserving either the elements of principle, of consistency or of equality. He distorts and perverts the teachings of Lincoln and of all the authorities upon the science of government, and misreads and misapplies the decisions of the Federal Supreme Court at the same time that he presumes to cite these as authorities for the fallacy which he supports.

#### AN ALLY OF SOCIALISM.

This champion of the Judicial Decision Recall expressly stated in his Carnegie Hall speech in 1912 that the functions as exercised at present by our courts were those to which they were "entitled" under our constitution. But only the other day in his speech at Buenos Ayres he aligned himself with the socialists who advocate the destroying of constitutional safeguards and then the wresting from owners of all holdings of private property. This they justify on the ground, as they say, that the judicial power to enforce those constitutional safeguards was usurped by the courts and that the right of private ownership of property is a right stolen or usurped from the people as a whole; and therefore, they say, the power of enforcement of these safeguards and the right of ownership of private property are a power and right which neither any citizen nor the entire citizenship is bound to respect. In his Buenos Ayres speech Roosevelt supported this doctrine which is the basis of Socialism,—when he said that the power at pres-

ent exercised by our courts to protect and preserve constitutional safeguards is a power "arrogated" to and usurped by the courts themselves.

His direct attack upon the judiciary is now carried to the extreme of the assertion, also made in his Buenos Ayres speech, that for more than thirty years the courts of this country have exercised their powers with "inexcusable and reckless wantonness on behalf of privilege," and against the interests of the people. This statement is no mere lapse from over enthusiasm, for he assures us that he makes it "gravely and deliberately." We have in him, then, an ex-president preaching Socialism. For this attack upon our judiciary is precisely the same as that which has been continuously for years, and also "gravely and deliberately," made by the Socialists as the basis for their doctrine that the Constitution with all its safeguards should be wiped out. Moreover, the instruments of destruction which they advocate as the most efficient to accomplish this end are precisely the same Judicial Recall measures that are urged by Roosevelt.

#### AN EX-PRESIDENT'S "MY REMEDY."

Roosevelt refers to the Decision Recall as a newly discovered remedy,—as "My Remedy,"—although it was thoroughly discussed and unanimously repudiated in the Australian Constitutional Convention ten years before, evidently, he ever heard of it. It was rejected as manifestly inconsistent with and repugnant to a constitutional form of government; and this, too, at the same time that the enlightened and progressive people of that entire continent adopted a constitution modeled in all its essential features upon that of this country.<sup>18</sup>

In an editorial in the Outlook of August 31, 1912, Mr. Roosevelt cites the Legal Essays of James B. Thayer, who, in his lifetime, was professor in the Law School of Harvard University; and implies that Prof. Thayer is authority in favor of the Judicial Decision Recall. He refers to Prof. Thayer as "Dean" Thayer, although Prof. Thayer was never dean. That position, however, is now occupied by Prof. Thayer's son, Ezra

<sup>18</sup> See address on "Constitution and Courts" by Justice Rousseau A. Burch, of the Kansas Supreme Court, March 30, 1912.

Ripley Thayer, who, in a recently published article, which is a most scholarly and convincing discussion, has met and answered all the essential arguments advanced for the Recall of Judicial Decisions and has proven that Mr. Roosevelt has again indulged in an erroneous citation of authority.<sup>19</sup> Dean Thayer says, after reviewing Prof. Thayer's teachings:

"Such things as Mr. Roosevelt's proposal and the state of public feeling from which it sprung are the precise evils against which Mr. Thayer's warnings were directed. \* \* \*

Among the evils which such judicial action brings in its train is suspicion of other decisions involving no such error and needless attacks on our constitutional system to secure ends attainable by means now at hand. These are to be expected from ardent reformers distinguished for courage and acuteness rather than sanity or patience, whose lack of training in the law leaves them unaware of the flexibility and scope of our existing constitutional machinery. \* \* \*

Under the proposed system, the form of a constitutional limitation remains, but it is binding only to such an extent and in favor of such persons as the majority of voters may choose. The citizen thus has no rights which the legislature and the majority acting together are bound to respect."

There is no excuse or necessity in this country for the Recall of Decisions. One of the chief arguments for its adoption is, that there is at present no appeal to the Federal Supreme Court from the decisions of state courts invalidating statutes on the ground that they are repugnant to the federal constitution, but that such appeal lies only when state courts uphold state statutes against the claim that they are unconstitutional. This deficiency, which has been long recognized, can be easily cured by changing the Judiciary Act, which it is within the power of the Congress to do; and such change is favored by the American Bar Association and by lawyers generally.

#### "PREPONDERANT OPINION."

It is now a little over three years since the question of the extent of the police power of the state was discussed by the Fed-

<sup>19</sup> "Recall of Judicial Decisions," by Ezra Ripley Thayer, Dean of the Law School of Harvard University, in Legal Bibliography of March, 1913; published also as S. D. 28, 63rd Cong., 1st Session.

eral Supreme Court in the case of *Noble State Bank v. Haskell*. Since then, two sentences, picked out of that decision and disconnected with their context or application, have been quoted as supporting every extreme theory repugnant to the fundamental principles of our constitutional system of government. They have been the solace and plaything of visionaries. They have been put forward as authoritative support, from the highest judicial tribunal, of every political vagary which has been advanced since they were uttered. From them the socialist claims not only justification for his creed, but also a promise of the effective accomplishment of his ends, and this, too, by the instruments by which he has said he would work out those ends; because, under his construction, they would compel all constitutional protection to property to yield to the forces of a "preponderant opinion." The pseudo-reformer who confounds change with progress cites these excerpted sentences as authority in favor of his proposition to do away with all constitutional safeguards and to turn every judge and every judicial decision over to the arbitrary caprice of a local temporary majority. Every possible change in the administration of the law or in our system of government, is advanced not only as justifiable but as feasible and consistent with constitutional law; because, as it is alleged, these excerpts extend the limits of the police power as theretofore established and make the police power of the respective states without limit paramount to every other constitutional consideration.

These sentences are, in the words of Justice Holmes, who wrote the decision :

"It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality of strong and preponderant opinion to be greatly and immediately necessary to the public welfare."<sup>20</sup>

I have often thought how Justice Holmes, when he hears the attempted application of these sentences, must yearn to divest himself for a time of his judicial position, which prohibits his answering directly the many distorted misapplications of his sentences, and to answer personally some of the claims which

<sup>20</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 111.

are made with regard to them. I venture that already, if we would read between the lines, he has suggested some such answer in his speech before Harvard Law Association of New York about a year ago when he inveighed against any policy founded upon an unreasonable misapprehension of the significance of fair competition in business, of private ownership and of private investments. He said:<sup>21</sup>

“We are apt to think of ownership as a terminus, not as a gateway; and not to realize that, except the tax levied for personal consumption, large ownership means investment, and investment means the direction of labor toward the production of the greatest returns, return that so far as they are great show by that very fact that they consumed by the many, not alone by the few. If I might ride a hobby for an instant, I should say we need to think things instead of words; to drop ownership, money, etc., and to think of the stream of products, of wheat and cloth and railway travel. When we do, it is obvious that the many consume them; that they now as truly have substantially all there is as if the title were in the United States; that the great body of property is socially administered now; and that the function of private ownership is to divine in advance the equilibrium of social desires; which socialism equally would have to divine, but which under the delusion of self-seeking is more poignantly and shrewdly foreseen.”

What Justice Holmes said in this case was no new doctrine of the police power, nor a rule extending any former doctrine. In the opinion denying reargument, he protests:

“The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power.”<sup>22</sup>

In former cases the Supreme Court speaking through Justice Holmes and through Justice Brewer, had said what was intended to be the same, and to have the same application, as was stated by Justice Holmes in this case. In the *Lochner* case, Justice Holmes had said:<sup>23</sup>

“A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic

<sup>21</sup> Speech before Harvard Law Assn., of N. Y., Feb. 13, 1913; S. Doc. No. 1106, 62nd Cong., 3rd Sess.

<sup>22</sup> *Noble State Bank v. Haskell*, 219 U. S. 580.

<sup>23</sup> *Lochner v. N. Y.*, 198 U. S. 45, 75-6.



relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health.”

Again, with reference to the claim that a woman's peculiar physical structure and duties would make an employment in which she is required to stand for long hours hazardous and peculiarly hazardous to her as a woman, Justice Brewer had said:<sup>24</sup>

“The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government, which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long contin-

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<sup>24</sup> Muller v. Oregon, 208 U. S. 412, 420-1.

ued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

The decision in the case of *Muller v. Oregon* expressly confirms the principle and the holding of the majority decision in the case of *Lochner v. New York*. The decision in the Oklahoma case of *Noble State Bank v. Haskell* expressly confirms the principle and holding in both these former cases, and in others.

The question there was as to the police power of the State of Oklahoma to regulate banking within the state and to provide guaranties under the authority of the state and under its direction against the insolvency of banks organized, maintained and operated with the sanction and under the authority of the state. It was held that the statutory provision for compulsory assessments, for the purpose of making up the guaranty fund so provided to be paid by the various banking institutions, was, under all the circumstances, within the police power of the state.

There is no new doctrine, and no extension of the formerly accepted doctrine, of the police power, either announced or intended to be announced in that case. There is therein no expressed or implied holding, or promise of holding, that the question of the constitutionality of a statute should or ever could, in any municipal community within the jurisdiction of the Federal Constitution, be finally decided by a referendum election of the citizens of that community.

#### INSTANCES OF RESULTING ABUSES.

Examples are apparent of the disasters which might result from the application of the Judicial Recall. Take the well known constitutional provision of the federal and all state constitutions that private property shall not be taken for public use without compensation. Under the present system, any statute which had this effect would be declared invalid by the courts. By the Recall of Decisions, this constitutional safeguard could be eliminated by a mere vote of the people at any time and under any circumstances. They could vote if they chose that all railroads, or any particular railroad, that all lands or any

particular pieces of land, or that all property or any property now held in private ownership, could without compensation, be confiscated to the state for general public benefit and even for general distribution. This means, precisely,—socialism.

Take another instance. The Bills of Rights in our constitutions prohibit the interference with the establishment and free exercise of religion. If any community, whether it be a city, county or state, should attempt to place undue restraint or burdens upon one religious sect as against another by a statute acceptable to a majority, such statute would be invalid. Thus, religious liberty is now vouchsafed to every individual and to every community and the preservation of such safeguard is insured so long as constitutional provisions are free from the results of temporary or local prejudice of this or that community. But this protection is swept away by the application of the Judicial Recall. If the constitutional provision may be suspended or disregarded at any time or place, or as to any particular statute, by a mere majority vote, then any locality, where a majority of the voters may happen to be of one religious sect, may pass, either by direct initiative or by their legislature, a statute oppressive of the minority and the same majority by popular vote are given the power to say that the constitutional prohibition shall be ignored as to such statute.

Accordingly, whether it be a question of protection of religious freedom or of the protection of the property or liberty of persons, each and all such provisions may, under the Recall of Decisions, be ignored by the arbitrary will of a local, temporary majority.

These are practical, probable abuses. The possible abuses are unlimited; for the very essence of the proposition is to do away with restraint and with safeguards, and to make the statute-making power identical and coincident with the power to declare its validity and to compel its enforcement.

#### THE FALLIBILITY OF POPULAR MAJORITIES.

The question-involved is not whether the courts make mistakes. The question is, Is it safe to deprive the courts of their

functions and to turn them over to the direct vote of majorities? Whether it be true or not that the public would be cautious and discriminating in the exercise of this power, the fatal objection to it is, as well stated by Prof. Judson, "not that the people would necessarily be unwise in its exercise, but because its existence, whether exercised or not, would be fatal to the independence of our judges."<sup>25</sup>

Speaking of the application of the Recall to the Judiciary, President Lowell, of Harvard, an eminent authority upon the history and science of government, says:

"If a judge is intended to render decisions that will be approved by the people at large, then he ought to be recalled if he fails to do so; but if his function is to administer justice without fear or favor, the recall is as much out of place as the decision of lawsuits by a mass meeting of citizens. The laws that he applies ought to be consonant with public opinion, but he ought to decide cases according to his conscience. If he is incompetent, corrupt, or in any way unfit for his high office, he ought to be impeached or removed after trial or hearing."<sup>26</sup>

It is often answered that the good sense of the people at large, as evidenced by their voice at the polls, may be safely relied upon. This was not the judgment of the framers of our constitution; for it was to protect against the probable and possible errors of temporary majorities that safeguards were written into the constitution. Why, up in Minnesota, two years ago, the country members of the legislature caused to be submitted to the voters of the state a constitutional amendment providing that, regardless of population, certain city districts should not be allotted a number of senators in excess of seven. This was known as the "seven senator" measure by which it was intended to discriminate in favor of the country and against the large cities in reapportioning the legislative districts under the last census. The two localities especially attacked were those represented by the two cities of St. Paul and Minneapolis. Nevertheless, at the state election, the seven-senator amendment passed in St. Paul and nearly obtained a majority in Minne-

<sup>25</sup> *The Judiciary and the People*, supra; page 182.

<sup>26</sup> "Public Opinion and Popular Government;" by A. Lawrence Lowell, Longmans, Green & Co., New York, 1913, page 148.

apolis. The voters of those two districts were of average intelligence and yet they voted in favor of a measure directed especially against them. That it was not adopted by the entire state was due to the mere accident that the country districts happened to vote against it.

In Oregon the attempts at the recall of officers, judicial and executive, have shown that the real motive and purpose of the recall have been based upon sectional or partisan differences, and that, no matter what the formal charges might be, in most instances the real basis of the recall has been a prejudice artificially worked up against the incumbent and the desire of another candidate to take his place.<sup>27</sup> The recall, moreover, is exercised, as shown by the *Weller case* in San Francisco and in other instances, not by a majority, but by a small minority of the voters. This so-called "progressive" measure has brought us back, in all states where the recall has been applied, to the evils experienced in ancient Greece, as described by Aristotle, under the old system of ostracism by popular vote, in exercising which the people "did not look to the interests of the community, but used ostracism for party purposes." As stated by Plutarch:<sup>28</sup>

"The ostracism was instituted not so much to punish the offender as to mitigate and pacify the violence of the envious, who delighted to humble eminent men, and who, by fixing this disgrace upon them, might vent some part of their rancor."

The independence of the judge should not be assailed by making him at any time directly controlled by or answerable to a majority of those who may assume to pass upon him or his decisions. The protective features of our constitution should not be replaced by measures which allow the makers of a statute the privilege of dictating as to its enforcement. Our present system of government by law should not be replaced by a system of government by men. Judges should be the independent servants of the law. Judges and the entire judiciary should be maintained and supported only as servants of the law; their persons, their office and their decisions should be kept free

<sup>27</sup> "Operation of the Recall in Oregon," by James G. Barnett; *American Political Science Review*, February, 1912.

<sup>28</sup> Life of Themistocles, quoted in White's "Legal Antiquities," *supra*.

from the influence of passion or prejudice; much more should they be kept free from the arbitrary control of temporary or local majorities. A judge should be free to act independently, and, as said by Chief Justice Marshall, "with nothing to control him but God and his conscience." He should at all times be free to heed the admonition given by Moses to the Judges of the Israelites:<sup>29</sup>

"Ye shall not respect persons in judgment, but ye shall hear the small as well as the great; *ye shall not be afraid of the face of man*; for the judgment is God's."

Our judges should be left free to live up to the ideal of the just man, who, in the words of Horace,<sup>30</sup>

"Firm in the consciousness of right, disdains, with equanimity, the frowns of a tyrant and the clamors of a mob."

#### CONCLUSION.

In closing, let me say, gentlemen, that I appreciate how little there is in what I have said which is new, or even instructive, to these representative members of your State Bar. As I have said, I am not here to instruct you upon constitutional law. A lawyer instinctively reads or listens to the modern advocacy of the judicial recall with a smile of contempt at the attacks directly or indirectly made upon our system of constitutional government. But the lawyers of this bar and of the bar of the nation have been altogether too content to pass by these attacks with only a smile, and to view the present agitation for the judicial recall as a mere wave of error against which the ultimate good sense of the electorate would insure safety. But the average voter, even the more intelligent voter, absorbed in his every day profession, business or occupation, has, as a rule, not the protection against false doctrines touching our constitutional system which your training as lawyers may have given to you. He has not generally at his command the fund of knowledge, somewhat technical in its nature, with which one having a legal training meets and answers instantly to his own satisfaction the insidious and enticing, but alto-

<sup>29</sup> Deut. 1, 17.

<sup>30</sup> Odes, Book III, 3.



gether false, statements and innuendoes which are the instruments of the propaganda of this fallacy.

The active opposition to this misleading propaganda has been too much limited to the forum of the lawyers. Its expression has been confined too much to the parlance of lawyers. The issues involved have been viewed too much as questions of politics or of the personal policies of advocates. My discussion before you has been not so much to you, as, through you, to the voting citizenship. It is our duty as lawyers to make every voter within our reach realize the subtle menace of the advocacy of the Judicial Recall, to expose the arguments which are advanced in its favor, and to demonstrate in a practical, intelligible way its inadvisability and its dangers to the safeguards which were established to protect the rights of life, liberty and property of every citizen. The arguments which are advanced for the judicial recall, are, as we well know, self-answering. But it avails little that you or I know that. That fact must be known and recognized by the voters. They have a right to know it; and they have a right to know it from you. It is the duty of every one of you, of every one of us, to see to it that the fact be brought home to every voter, that the arguments presented for the judicial recall are pure fallacies, that these measures are not progressive, that they are not remedial, nor constructive, but that they are subversive of every public and private right and interest which our Constitutional Government was established to safeguard.

#### GENERAL NOTE.

A detailed discussion of the arguments for and against the Judicial Recall measures is not here attempted. For further and more full treatment of the question see, in addition to other discussions cited, (1) "The Recall of Judges," address before Minnesota State Bar Association, given June 19, 1911, published as S. D. 649, 62nd Congress, 2nd Session; (2) "The Judicial Recall—A Fallacy Repugnant to Constitutional Government;" in *Annals American Academy of Political and Social Science*, September, 1912; published as S. D. 892, 62nd Congress, 2nd Session; (3) "The Judiciary as the Servant of the People;" address before Tennessee State Bar Association, June 26, 1913; published in pamphlet form for circulation the latter being a revision from the commencement address before the graduating class of the Law School of the University of South Dakota, given at Vermillion, S. D., June 11, 1913; (4), "The Recall of Constitutional Safeguards;" annual address before the Oklahoma State Bar Association, at Oklahoma City, Dec. 29, 1913, also printed for circulation.

A useful bibliography on the subject is attached to the 1913 report of the American Bar Association Committee to Oppose the Judicial Recall. Copies of this report, with several representative arguments against the Judicial Recall by President Butler, Dean Thayer, William Hornblower, Senator Sutherland, and others, will, on request, be mailed to any address by the Chairman of the Committee, 1006 Met. Life Bldg., Minneapolis, Minn.

For references to arguments both for and against, with extensive bibliography, see the "Recall" number of *Debaters' Handbook Series*, compiled by E. M. Phelps, published 1913, by H. W. Wilson & Co., White Plains, N. Y., formerly of Minneapolis, Minn.













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# **Muckraking the Constitution**

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**ADDRESS**

**Before the State Bar Association  
of North Carolina**

**DELIVERED AT**

**WRIGHTSVILLE BEACH, N. C.**

**JUNE 30, 1914**

**BY**

**ROME G. BROWN**

**Minneapolis, Minnesota**

(Also, with slight changes, delivered before Graduating Class of Law School of University of State of Indiana, at Bloomington, Ind., June 19, 1914; before Texas State Bar Association, at Dallas, Texas, July 7, 1914; and before Indiana State Bar Association, at Indianapolis, Ind., July 9, 1914.)

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**PRESS OF BYRON S. ADAMS  
WASHINGTON, D. C.**





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**Minneapolis, Minnesota**



## MEMBERS OF THE NORTH CAROLINA BAR:

We are confronted today with a persistent complaint and criticism of the government under which we live and with a widespread cry for changes in its administration and in its form which are, in fact, revolutionary in their nature. I have, therefore, thought it might be pertinent to consider the nature of the sources of some of the prevalent attacks upon our Constitution; to review the methods of their advocacy; and to point out the real significance of certain changes in our fundamental law which are proposed, under the false guise of remedial reforms.

### THE PROPAGANDA OF UNREST.

Over 80 years ago (1833), in a speech made in the U. S. Senate, Daniel Webster said:

“There are persons who constantly clamor. They complain of oppression, speculation and pernicious influence of accumulated wealth. They cry out loudly against all banks and corporations and all means by which small capitalists become united in order to produce important and beneficial results. They carry on mad hostility against all established institutions. They would choke the fountain of industry and dry all streams. In a country of unbounded liberty, they clamor against oppression. In a country of perfect equality, they would move heaven and earth against privilege and monopoly. In a country where property is more evenly divided than anywhere else, they rend the air shouting about agrarian doctrines. In a country where wages of labor are high beyond parallel, they would teach the laborer that he is but an oppressed slave.”

The propaganda of unrest is always with us. At recurring intervals it emerges with increased activity and intensity. It is directed at one time at abuses of our social system; at another time at prevailing economic conditions; and at another time against the administration of some department of our government. At no time in the history of this nation have the disciples of discontent, the oppo-

nents of existing institutions, been more active in their clamors for change, than at the present time. The varied forces of unrest are today combined, in what seems to be a tacit alliance, the purpose and effect of which is to create and encourage among the people of the nation a prevalent sentiment of dissatisfaction with the administration of justice and to spread a feeling of discontent and distrust of the judicial departments of our governments, national and state. The movement extends even to a reckless attack upon our system of government. To such an extent have these disturbing influences been exerted, that there has been brought about a widespread demand, not merely for reforms for existing evils which are feasible and consistent with our present form of government,—but a demand, based sometimes upon a deep-seated conviction, for a change in the form of our government. The cry is that, on account of the retention of constitutional restraints upon the legislative branch of the government and upon the direct and untrammelled power of the voters to have enforced, as spoken by any temporary or local majority, the arbitrary will of the voters,—our constitutional democracy is, in theory and in fact, undemocratic. We are told that the republican representative system of government, established under our American Constitution, should be replaced by a government of pure democracy.

However enticing may be the general terms in which such a clamor is put forth, its real significance can be understood only by a statement in plain terms of the revolutionary nature of the doctrines advanced and of the disastrous results which may follow upon their application. This new doctrine means nothing else than the eliminations from our constitutions, federal and state, of the express limitations therein contained upon the legislative branch of the government and upon the enforcement, at any time or place, of the will of popular majorities. It means the elimination from our system of government of judicial functions. It means the destruction of those safeguards to the rights of personal liberty and of property which can not be vouchsafed to any citizen under any government whose constitution does not embody the principles of the Bill of Rights; nor under any government which does not guarantee the enforcement of those fundamental rules of conduct, as binding upon the legislative and the

popular will, by an independent judiciary whose primary function is to declare statutes invalid which contravene the fundamental law.

Those who thus attack our present system of government pretend to offer a remedy for all existing evils in their proposal to establish the judicial recall, in the form of the recall of judges or of the recall of judicial decisions, by referendum ballot. In fact, however, their so-called "remedy" is neither remedial nor constructive nor progressive. It has only the effect of reverting to the supreme, unrestrained dominance of popular caprice and passion. It eliminates those safeguarding checks which, under our system of government, allow the enforcement only of the deliberate, impassionate judgment of the voters and which compel a distinction, so far as enforcement is concerned, between the deliberate, well-considered judgment of the voters and the expression of mere temporary popular whim. A constitutional safeguard means nothing without an established means of its enforcement. Such intervention can be exercised only by a tribunal which is independent and whose final decrees, impartially and fearlessly spoken, shall be enforced. The subjection of judges to an arbitrary recall by popular vote is only an indirect method of destroying the independence of the judiciary and of the essential function of that department of the government. The submission of judicial judgments to a popular referendum ballot is a destruction of the judicial function and, at the same time, a destruction of the constitutional safeguards which it is the duty of the judiciary to enforce.

The subversive character of this new cult can be best understood by a brief examination of the sources from which it originates and of the methods of its advocacy. I do not refer to those students of our institutions who, considering existing evils in the administration of justice, are working out reforms, constructive in their nature and consistent with our present system of government. In this really progressive method of reform the bench and bar of the entire country are, for the most part, united. I refer to those who confound "change" with "progress," who indulge in wanton and even malignant attacks upon our present system of constitutional government as a ground for advocating a complete change in our Constitution, or as a ground for the establishment of sub-

versive changes, under the guise of remedies, such as those embodied in the judicial recall. To a great extent these attacks upon our present system have degenerated into a poisoning of popular sentiment against our present constitutional government. To the student who has learned to distinguish between truth and untruth, these attacks bring only a shock to his sense of decency. To many of the masses, however, untaught in the science of government, they intensify discontent with existing institutions and induce them to resort to any change, however destructive of their interests, which may be suggested as a panacea.

The profession of muckraking is now extended to attacks upon our Federal Constitution. In view of the fact that a prominent member of your state bar, in a recent address, avowedly directed to the citizenship of this entire nation, has deemed it consistent with his high judicial position to attempt to hold up to derision our American Constitution, I have deemed it proper, in complying with your request to address you on some subject, that I, as a citizen of the United States and as a member of the American bar, should take advantage of this opportunity (in the most kindly spirit, let me say, so far as persons or personalities are involved, but unflinchingly, so far as conclusions necessarily follow from the printed record of the facts)—at this time and place to make—what might be termed—some “deductions at the source.”

#### OUR CONSTITUTION A SCIENTIFIC MODEL.

It is not my purpose here to attempt a defense of our constitutional system of government. In contrast, however, with the methods of attack which I shall outline, let me here briefly note that the American Constitution, with its established functions of the judicial department, is in fact, and has become recognized as such throughout the world, the foremost scientific model of fundamental law.

The history of the advance of civilization has been the history of the emergence of the judicial conscience from the malignant influence of oppressive interference. The Babylonians, over 2,000 years before the Christian Era, had the recall of judges and the recall of decisions by the exercise of the tyranny of monarchy. Under the

pure democracy of ancient Greece, through the system of ostracism, was exercised the judicial recall in both its forms. So, under the unlimited democracy of the Roman Republic, the referendum ballot was used to inflict banishment or death upon the judges or to overrule their decisions. The transition from comparative barbarism in governmental affairs, from the tyrannies of monarchy and of democracy which brought disgrace and disaster to the governments of old, to an enlightened recognition by all classes of the necessity of a re-establishment of the judicial function, began when the English people wrested our Bill of Rights from King John at Runnymede. But that was only the first step; for it took centuries to bring home to the advancing English civilization the fact that Bills of Rights, no matter how assertive of the inalienable rights of the individual against the injustice and oppressions of the tyranny of arbitrary control, were futile to effect protection without the independence of that department by the proper exercise of whose functions they might be enforced. Such power of enforcement was lacking until the beginning of the 18th century; because, prior to that time, the English sovereign reserved and exercised the power of arbitrary recall of any judge, and judicial judgments were subject to the election of the sovereign. The statute of William III, however, enacted nearly a century before the adoption of our Federal Constitution, established in English jurisprudence the principle that the members of the judiciary, during the term of office for which they were selected, should be independent judges of the law and not the servile tools of either a monarchical or popular sovereignty; that their judgments when rendered should be enforced as the law, at least as the law of the case; and that their recall or that of their judgments should not be accomplished by hue and cry spread among the people to influence the results of a referendum election, the possibility of which, if recognized by law, always stands as a menace to the justness and independence of the judge and of his judgments.

#### THE UNFETTERING OF THE JUDICIAL CONSCIENCE.

It took centuries even to begin this revolt from barbarism. It took still further centuries to establish the principle of an independent



judiciary as a requisite to the most enlightened system of jurisprudence ever known in the history and science of government. In the two centuries following, it was by the enforcement of this principle that meaning and efficacy were given to the fundamental doctrine of individual liberty embodied in the same Bill of Rights which is written into our own Federal Constitution, and made, by the same instrument, the supreme law of the land controlling upon all judges, state and federal; and which has become also a part of every state constitution since formulated.

It was under this establishment of effective protection, not merely theoretical protection, of the individual and of the minority against the arbitrary caprice and oppression of local or temporary majorities, that has made stability, efficiency, security of life, liberty and property of persons and of minorities, prosperity and enlightenment of its citizens, the characteristic features of the government of this the greatest republic in the world's history. It is these scientific, practical and effective features of our system of government which have made it the model for all modern governmental reorganizations and have made our Constitution and the government administered under it the objects of admiration and even marvel of the masters of the science of government. Gladstone characterized our Constitution as expounded by Marshall, "the most wonderful work ever struck off at a given time by the brain and purpose of man." Bryce, the greatest modern student and authority upon constitutional government, terms ours, as "the first true federal state founded on a complete and scientific basis."

Lord Brougham, referring to our Constitution, said:

"The power of the Judiciary to prevent either the State legislature or Congress from overstepping the limits of the Constitution is the very greatest refinement in social quality to which any set of circumstances has ever given rise, or to which any age has ever given birth."

The English historian, John Morley, referring to the opinion of the world's students of government and their attitude towards our Constitution, said:

"Everybody praises the American Constitution these days."

Lord Salisbury said, in 1882:

"I confess I do not often envy the United States, but there is one feature in their institutions which appears to me the subject of the greatest envy—their magnificent institution of a Supreme Court. In the United States, if Parliament passes any measure inconsistent with the Constitution of the country, there exists a court which will negative it at once, and that gives a stability to the institutions of the country which, under the system of vague and mysterious promises here, we look for in vain."

If Lord Salisbury says this of the English system, what reply would he make to one who holds up to you as models, above our own, the judicial systems, not only of England, but of France and Germany? The French and German are systems still more "of vague and mysterious promises," for the very reason that they are based to a still greater extent upon a disregard for precedents. A government of law cannot exist where the only basis for arriving at the conclusions of fact and of law in a litigated case or in a criminal prosecution is the mere passing impulse of the triers with reference to what they may deem to be the merits. One might as well commend to us the system of Mexico. There is a government, the administration of which is not hampered by any regard for precedents, nor by any regard for a constitution, much less by any regard for constitutional limitations. There is a government administered without the intervention of any judicial functions, usurped or otherwise. In Mexico they are not bothered with precedents, nor even with any system of promises of protection to life, liberty and property, either expressly written or vague and mysterious. The condition in Mexico is the logical result of the elimination of constitutional protection and of the debasement of the judicial function. To such a goal would the revilers of our American Constitution and judiciary turn the people of this Nation. Justice, equality and consistency in the administration of law, protection for the established rights of life, liberty and property require that all magistrates should act with a proper regard for precedents.

Shall we replace our present constitutional democracy with a democracy which has no enforceable Bill of Rights; which has no

stable, sure, consistent or equally administered constitutional protection for the individual as to his life, liberty or property? Shall we destroy that stability of our institutions which, as Lord Salisbury said, is protected by the exercise of judicial functions as they are established under our Constitution? Shall we, by making the will of the legislature enforceable upon the demand of a popular majority, destroy constitutional protection and make our system of government also a mere "system of vague and mysterious promises"?

All this we do as soon as we consent to subject judges or judicial judgments to a referendum election.

### THE WANTON ATTACKS OF MUCKRAKERS.

In contrast with these views of our Constitution held by scholars of authority, let us consider the view represented by certain classes of our citizens who, by muckraking processes, work upon the misguided prejudices and discontents of the elements of unrest,—those agitators who have become purveyors of error and all of whom are shouting for the judicial recall.

### THE SOCIALIST MUCKRAKER.

The most consistent, the most logical opponent of our Constitution is the Socialist. He is the foremost of its antagonists, the first in priority of time, the most active and the most persistent. The Socialist, however, frankly admits that it is a part of his social and political creed to destroy our Constitution and our government, and to do away with all rights of private property, and, indeed, with all rights so far as safeguarded by constitutional provision. He frankly avows that among the barriers between socialism, on the one hand, and an orderly government with constitutional safeguards, upon the other, the first that must be broken down is the present established authority of the judiciary to render unenforceable any statute which contravenes the express protections of the Constitution. He would wipe out these barriers, if possible, by repeal of the Constitution itself; and, until such repeal shall be accomplished, he would destroy constitutional protection by eliminating all power of its enforcement.

In other words, he would justify any attack upon the judiciary, on the ground that the courts have stolen, by usurpation, from the people, the power to determine finally as to the constitutionality of a legislative enactment. It is significant that the instrument which the socialists would use for this revolutionary change is the judicial recall. The modern advocacy of the judicial recall measures sprang from socialism. The present socialist labor party was the first political party in America to demand the recall. The judicial recall measures are essentially mere instruments of socialism. As stated by the leading organ of the socialists—"The appeal to (T)Reason,"—speaking of the judicial recall:

"It is the means whereby the people will be enabled to inaugurate Socialism, and after that is done they may secure democracy in industry."

So the socialists inveigh against the Constitution and against the judiciary. It is the platform of the National Socialist Party which, after the recall plank, urges the abolition of the power of the courts to declare statutes unconstitutional and claims that this power has been usurped by the courts. The same platform further declares that these measures—that is the recall measures and the abolition of the functions of the courts,—

"are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance."

Keep these facts in mind when you are told by others, who know or ought to know better, that the powers exercised by our courts have been "arrogated" to or "usurped" by the courts themselves; and when you are urged to wrest from the courts their chief functions and to turn over to the people the direct control of judges or the direct adjudication of constitutional questions.

### ALLIES OF SOCIALISM.

But the Socialist is to be commended in his attacks upon the Constitution as compared with the less frank, the subtle and insidious attacks indulged in by those who either know, or ought to know, better.

Aristotle defined a demagogue as one who catered to the prejudices of the people by attacking existing institutions, and particularly the judges and other magistrates, and urging more power for the people to be expressed by popular majorities, although leading to a non-constitutional democracy of a sort which is analogous to a tyranny.

Aristotle's definition applies today to many conspicuous advocates of the judicial recall, some of whom I shall mention.

Ex-President Roosevelt has demonstrated that he is afflicted with an incurable "idiosyncrasy" for all legal and constitutional questions. He has just been telling the citizens of the South American Republics, whose governments are modeled upon our own, that our constitutional system of government is wrong and that the prime function of our courts is performed only through usurpation of judicial power. In his speech the other day at Buenos Ayres he alligned himself with the socialists who advocate the destroying of constitutional safeguards and then the wresting from owners of all holdings of private property. The socialists, however, are logical in their position; because they say, that the judicial power to enforce these constitutional safeguards was usurped by the courts, and that the right of private ownership of property is a right stolen or usurped from the people as a whole; and, therefore, that the power of enforcement of those safeguards and the right of ownership of private property are a power and a right which neither any citizen or the entire citizenship is bound to respect.

Roosevelt allied himself with the socialists, advancing the doctrine which is a creed of socialism, when he said, at Buenos Ayres, that the power at present exercised by our courts to preserve and enforce constitutional safeguards is a power "arrogated" to and "usurped" by the courts themselves. He further allied himself with the socialist method of muckraking our constitution and our judicial

system when he stated, at the same time, that for more than 30 years the courts of this country have exercised their powers with "inexcusable and reckless wantonness on behalf of privilege," and against the interests of the people. This statement is no mere lapse from overenthusiasm, for he assures us that he makes it "gravely and deliberately." We have in him, then, an ex-President preaching socialism. For this attack upon our judiciary is precisely the same as that which has been continuously for years (and also, in the words of Roosevelt, "gravely and deliberately") made by the socialists as the basis for their doctrine that the Constitution with all its safeguards should be wiped out. Moreover, the instruments of destruction which they advocate as the most efficient to accomplish this end are precisely the same judicial recall measures that are urged by Roosevelt.

#### AN EX-PRESIDENT'S "MY REMEDY."

Roosevelt refers to the decision recall as a newly discovered remedy,—as "My Remedy,"—although it was thoroughly discussed and unanimously repudiated in the Australian Constitutional Convention ten years before, evidently, he ever heard of it. It was rejected as manifestly inconsistent with and repugnant to a constitutional form of government; and this, too, at the same time that the enlightened and progressive people of that entire continent adopted a constitution modeled in all its essential features upon that of this country.

In an editorial in the *Outlook* of August 31, 1912, Mr. Roosevelt cites the Legal Essays of James B. Thayer, who, in his lifetime, was professor in the Law School of Harvard University; and implies that Prof. Thayer is authority in favor of the Judicial Decision Recall. He refers to Prof. Thayer as "Dean" Thayer, although Prof. Thayer was never dean. That position, however, is now occupied by Prof. Thayer's son, Ezra Ripley Thayer, who, in a recently published article, which is a most scholarly and convincing discussion, has met and answered all the essential arguments advanced for the Recall of Judicial Decisions and has proven that Mr. Roosevelt has again indulged in an erroneous citation of authority. Dean Thayer says, after reviewing Prof. Thayer's teachings:

"Such things as Mr. Roosevelt's proposal and the state of public feeling from which it sprung are the precise evils against which Mr. Thayer's warnings were directed. \* \* \*

Among the evils which such judicial action brings in its train is suspicion of other decisions involving no such error and needless attacks on our constitutional system to secure ends attainable by means now at hand. These are to be expected from ardent reformers distinguished for courage and acuteness rather than sanity or patience, whose lack of training in the law leaves them unaware of the flexibility and scope of our existing constitutional machinery. \* \* \*

Under the proposed system, the form of a constitutional limitation remains, but it is binding only to such an extent and in favor of such persons as the majority of voters may choose. The citizen thus has no rights which the legislature and the majority acting together are bound to respect."

There is no excuse or necessity in this country for the Recall of Decisions. One of the chief arguments for its adoption is, that there is at present no appeal to the Federal Supreme Court from the decisions of State courts invalidating statutes on the ground that they are repugnant to the Federal Constitution, but that such appeal lies only when State courts uphold State statutes against the claim that they are unconstitutional. This deficiency, which has been long recognized, can be easily cured by changing the Judiciary Act, which it is within the power of the Congress to do; and such change is favored by the American Bar Association and by lawyers generally.

#### MUCKRAKING BY THE BENCH AND BAR.

Deliberate and sane criticism of the courts, with a view to the promotion of reforms in procedure or in any other phase of the administration of justice, has been a common and most welcome feature of the discussions which have been indulged in by members of both the bench and of the bar of this country. A few isolated examples, however, have been presented of wanton, and even malignant, attacks, by lawyers and even by judges, not only upon the courts, but upon our constitutional system of government. These latter, for the most part, have comprised the members of the legal profession who have become obsessed with the judicial recall fallacy. Because of the rev-



olutionary character of the measures which they advocate, they can justify their position only by attacks which are directed at the very basis of established judicial functions and indeed of our present constitutional form of government.

So it is that we find, as the chief apologist of the judicial decision recall, the dean of a law school of once high repute advocating the recall of decisions as merely "a new method of constitutional amendment by popular vote"; although it is a self-demonstrated fact that the decision recall means an arbitrary or local suspension or application of constitutional safeguards, without preserving either of the elements of principle, of consistency or of equality.

Even a Harvard professor of history has been so far carried away with so-called "progressive" notions that he advocates the recall fallacy and argues against constitutional restraint and in favor of a system of "A Government of Men."

It remained for a Chief Justice of a State Supreme Court to make of himself one of these conspicuous, if not shining, exceptions to the generally sane attitude toward these questions which has been held by the American bench and bar. Chief Justice Walter Clark of the Supreme Court of North Carolina, in his address at Cooper Union, New York, last January, chooses to view the issues of reform, social, economic and constitutional, which have been and still are pressing, as merely issues between an unrighteous controlling class, upon the one side, and an oppressed class, upon the other. The past and present issues of judicial reform, of the framing, construction and enforcement of our Constitution itself,—all these issues have been and still are simply the struggle between the "exploiters," upon the one hand, and of the "exploited," upon the other hand.

The Constitutional Convention at Philadelphia, in 1787, assembled, he says, only "for the nominal purpose" of creating better business and commercial relations between the States and to supply the need of a stronger Union. In default of the trust imposed upon them, and using the pressing necessities only as a pretext for their selfish ends, the framers of our Constitution shaped that instrument, "with sublime audacity," as he says, with the very intention and with the very result that the "reactionary" "exploiters" of an oppressed

people then took and have since maintained control of our government. As "the allied vested interests" then intentionally made the Federal Constitution an instrument of oppression and injustice, so they next, by various means, persuaded the different States to its adoption. The same "vested interests" afterwards procured to be stolen or "usurped" from the people, the power, never intended for the courts, of the Judiciary to declare invalid and unenforceable statutes repugnant to the express prohibitions of the Constitution. This was a further grasp of power by the designing "exploiters" in control. More than that, the courts of the land, he asserts, have become, by usurpation, the arbitrary, capricious and oppressive rulers of the people. The XIV amendment "means anything and everything that the judges see fit." The decisions of the Federal Supreme Court have been subtle perversions of the law and the reasonings of those decisions are mere instances of "sardonic irony" and of "adding insult to injury."

This Chief Justice re-echoes the socialist cry when he says, referring to the discontent prevailing among certain classes of citizens:

"The progressive and humanitarian measures necessary to the betterment of their condition are almost invariably negated by the courts, whose sympathies are with the propertied class and vested rights."

To overturn this "Government by Judges,"—a government which is "very largely a plutocracy," he would deprive the judiciary of its power of final determination of constitutional questions and would leave the adjudication of such questions to a referendum ballot through the recall of judicial decisions or would deprive the courts entirely of their power of declaring any statute unconstitutional. He would, therefore, replace our system of judicial functions with that which is in vogue in England; although, as we have seen, English statesmen have deplored the deficiencies of their system and praised the American judicial function as a scientific model for all the world.

Our confidence in the correctness of the observations of this jurist is not increased by the fact that he tells the people of New York that it was judicial usurpation when the United States Supreme

Court overruled "your State Statute," in the *Lochner* case and that, in the same decision, Justice Holmes makes a certain statement in regard to the police power; for the statement quoted from Justice Holmes was not made in the *Lochner* case, but appears, in connection with an entirely different state of facts, in the later case of the *Noble State Bank vs. Haskell*.

Before you, before any citizen of well balanced intellect, not tainted with the enticing but fallacious dogmas of socialism, who has studied the subject impartially, it is unnecessary to offer an answer to the jibes and epithets with which Chief Justice Clark characterizes our Constitution, its makers and its expounders. A lawyer of the American Bar naturally resents such derision of our institutions, especially when uttered in such a spirit from such a source.

But consider the effect of such utterances, especially from such origin, upon masses of the people, untaught in the science of government, many of whom are already incited to restlessness and even to open defiance of authority. Why thus wantonly and recklessly furnish encouragement, aid and ammunition to the forces of disruption? Why thus excite further the already too prevalent spirit of antagonism to our free institutions? Why thus feed the fires of unrest, of discontent and even of rebellion, which are even now threatening devastation?

The primary purpose of public discourse touching the relations between the government and the individual should be to inculcate methods of calm, deliberate, impartial study and consideration on the part of the citizen, and to help to bring to him an enlightened appreciation of the necessity and wisdom of established rules of conduct in governmental law, as well as in respect of social relations; to teach the citizen that his selfish whim, caprice, prejudice or interest must yield, to some extent at least, to the general interests of the community; that the general public interests can not be safeguarded without lawful submission to the authoritative enforcement of the protective provisions of the fundamental law, which are such rules of conduct established for the good of the nation; and that that government is ultimately the most wise and beneficent, as well as the most stable, which is founded upon enforceable rules of conduct protective

of the individual and of the minority, as well as of the majority. The object should be to promote better citizenship.

If the holding up, before the people of our nation, of our Constitution and our American form of government to the derision and contempt of its citizens is promotive of better citizenship, then "better citizenship" means the citizenship of socialism; it means the rule of the dynamiter. Justice Clark's address would make an orthodox chapter in the creed of the socialists, or a consistent editorial in their organ, the "Appeal to Reason," or in the anarchist organ, "Mother Earth."

#### MUCKRAKING JOURNALISTS.

Prior to the Cooper Union address of Chief Justice Clark, the prize muckraker of the Constitution and of the courts had been a certain socialist contributor to a once well known monthly magazine. You will note that Chief Justice Clark shows more familiarity and more sympathy with this propagandist of socialism than he does with the Federal Constitution or with the decisions of the Federal Supreme Court.

Some of you may remember, even in these days of its obscurity, a monthly periodical known as *Pearson's Magazine*. Last summer this magazine exploited in its columns such unwarranted and dastardly attacks upon our Federal Constitution that it then sufficiently demonstrated its right to the boast appearing upon its cover page,—that it prints stuff "that others dare not print." Even in this day of sensation-mongers it is probably true that no other publication would have had the enfrontery to violate truth, to shock all sense of decency, to the extent that this magazine has done. It ridicules the term "patriot fathers" as applied to the framers of our Constitution. It brands them as "grafters" who initiated and carried through a change in our system of government and framed and established a constitution, upon a plan which "was never meant to bring about rule by the people," but which was adroitly put together and the adoption of which was surreptitiously and deceitfully procured,—all for the sole purpose "to enhance the value of their own property holdings and to tighten and increase the burden of the shackles which theretofore existed upon the liberty of the common people." The Constitution

of the United States, it says, was made for the people "in the same sense that sheep-shears are made for sheep. The gentlemen who made the Constitution had sheep to shear." This is the view presented by a 1913 American journal, and in support of its propositions it indulges in a mess of misinformation and of garbled and distorted citations from authorities.

Another unscrupulous and despicable contributor presented some time ago in another magazine (*Everybody's*,—it should be nobody's) a venomous attack upon the judiciary, in which he traduced individual judges, maligned the courts, and calumniated the entire judicial department by false statements, by subtle innuendos, which undoubtedly brought conviction to the general mass of unthinking readers, but which to discriminating persons brought only the reaction of an intense shock to their sense of decency. The Tennessee Bar may be proud of the manner in which one of its members paid his respects to this "Connolly person" journalist; and if any of you should wish to read in print the sentiments of protest which you felt at the time, I would refer you to Mr. Caruthers Ewing's speech two years ago before the Georgia State Bar Association.

### JUDICIAL USURPATION.

The claim of usurpation by the courts of the power to declare unconstitutional statutes unenforceable is such a common basis for the Judicial Recall argument that passing it entirely might be construed as an admission. This campaign cry of usurpation, which has been so long made by the Socialists and their allies, has been so many times and so thoroughly answered that it seems impossible that any sane and conscientious observer could fail to recognize its fallacy. Constitutional safeguards are meaningless without some well-established power of their enforcement. That our fundamental law makes the enforcement of these constitutional safeguards the primary function of the Judiciary, Federal and State, was demonstrated by Chief Justice Marshall in the famous case of *Marbury vs. Madison*, 1 Cranch, 137, in which Chancellor Kent declares,

"the power and duty of the Judiciary to disregard an unconstitutional act of Congress or of any State legislature, were de-

clared in an argument approaching to the precision and certainty of a mathematical demonstration."

The limitations of the Constitution were expressly made the supreme law of the land, binding upon all courts, Federal and State, and with the duty, under oath, of every judge of every court to observe them as the paramount law of the land. Chief Justice Marshall demonstrated that, not only by express provision, but also by necessity, it was the duty of the courts to declare unenforceable a statute which contravened the Constitution. He said:

"The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? \* \* \* A legislative act contrary to the Constitution is not law."

It is urged by the socialists and by their coadjutors, the advocates of the judicial recall, that this decision by Chief Justice Marshall was a usurpation by, or arrogation to, the courts of a power not expressed and never intended to be enforced as a constitutional judicial function. No better answer to this claim can be made than the convincing arguments of Marshall in the case of *Marbury vs. Madison*. But that this was the interpretation of the Constitution, upon the faith of which, more than any other single feature, the original states were persuaded to accept it, is shown by the various arguments of Ellsworth, Hamilton and others prior to its adoption. Hamilton urged in the *Federalist*:

"There is no liberty where the power of judging be not separate from the legislative and executive power. \* \* \* The complete independence of the courts of justice is peculiarly essential in a limited constitution, \* \* \* Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the Constitution void."

Upon the same ground Ellsworth, on January 7, 1788, urged the ratification of the Constitution upon the Connecticut convention, when he said:

“If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, or if they make a law which is a usurpation upon the Federal Government, the law is void; and upright independent judges will declare it so.”

This doctrine of the judicial function had been prevalent in the States of the Federation, prior to the adoption of the Federal Constitution, and had been recognized in the State of North Carolina where, in the case of Bayard vs. Singleton, Martin's Reports, page 42, it was advanced by Mr. Iredell, who was subsequently an Associate Justice of the Federal Supreme Court. Indeed, fourteen years before the decision of Chief Justice Marshall in the case of Marbury vs. Madison, and immediately upon the adoption of the Federal Constitution, the Federal Judiciary Act was passed by the First Congress under the Constitution, expressly providing, as it has ever since provided, for the review in the Supreme Court of the United States of the judgments of inferior Federal courts, *as well as for the review of cases where the validity of State statutes or any exercise of State authority should be drawn in question, on the ground of repugnance to the Constitution, treaties or laws of the United States, and the decision should be in favor of their validity.*

Now how can any man, who is informed of the facts and who at the same time is sane and conscientious, for a moment say that the judicial function of declaring statutes unenforceable which are repugnant to constitutional prohibitions was usurped by the courts through the decision of Chief Justice Marshall in 1803, and that therefore it never existed in fact and was never before recognized and was never before intended to be recognized in our American jurisprudence? Why, not only had it been so understood by the states



in their adoption of the Constitution, but almost the first act of the American Congress under that Constitution, and fourteen years before Chief Justice Marshall's decision, was to write that particular judicial function into the statutes of the United States and in the very form and wording in which it has ever since been expressed.

This Act was drawn by Oliver Ellsworth, the third Chief Justice of the United States, and himself a member of the Federal Convention. Thus the First Congress confirmed that theory of the Constitution, on the faith of which its adoption by the States was procured, and which was further confirmed and demonstrated by Chief Justice Marshall, in the first case in which it was passed upon by the Federal Supreme Court,—that the question of the repugnance of a statute to constitutional prohibition was a judicial question, the determination of which belongs, under the Constitution, to the courts; and that the final determination of the repugnance of a statute, Federal or State, to the Federal Constitution belongs to the United States Supreme Court. This charge of "usurpation" is a mere pretext for striking at the very keystone of our system of government.

#### "PREPONDERANT OPINION."

It is now a little over three years since the question of the extent of the police power of the state was discussed by the Federal Supreme Court in the case of *Noble State Bank vs. Haskell*. Since then, two sentences, picked out of that decision and disconnected with their context or application, have been quoted as supporting every extreme theory repugnant to the fundamental principles of our constitutional system of government. They have been the solace and plaything of visionaries. They have been put forward as authoritative support, from the highest judicial tribunal, of every political vagary which has been advanced since they were uttered. From them the socialist claims not only justification for his creed, but also a promise of the effective accomplishment of his ends, and this, too, by the instruments by which he has said he would work out those ends; because, under his construction, they would compel all constitutional protection of property to yield to the forces of a "preponderant opinion." The pseudo-reformer who confounds change with progress

cites these excerpted sentences as authority in favor of his proposition to do away with all constitutional safeguards and to turn every judge and every judicial decision over to the arbitrary caprice of a local temporary majority. Every possible change in the administration of the law or in our system of government, is advanced not only as justifiable, but as feasible and consistent with constitutional law; because, as it is alleged, these excerpts extend the limits of the police power as theretofore established and make the police power of the respective states without limit paramount to every other constitutional consideration.

These sentences are, in the words of Justice Holmes, who wrote the decision:

“It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality of strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”

What Justice Holmes said in this case was no new doctrine of the police power, nor a rule extending any former doctrine. In the opinion denying reargument, he protests:

“The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power.”

In former cases, the *Lochner* case from New York and the case of *Muller vs. Oregon* from Oregon, the Supreme Court, speaking through Justice Holmes and through Justice Brewer, had said what was intended to be the same, and to have the same application, as was stated by Justice Holmes in this case.

The decision in the case of *Muller vs. Oregon* expressly confirms the principle and the holding of the majority decision in the case of *Lochner vs. New York*. The decision in the Oklahoma case of *Noble State Bank vs. Haskell* expressly confirms the principle and holding in both these former cases, and in others.

The question there was as to the police power of the State of

Oklahoma to regulate banking within the state and to provide guarantees under the authority of the state and under its direction against the insolvency of banks organized, maintained and operated with the sanction and under the authority of the state. It was held that the statutory provision for compulsory assessments, for the purpose of making up the guaranty fund so provided to be paid by the various banking institutions, was, under all the circumstances, within the police power of the state.

There is no new doctrine, and no extension of the formerly accepted doctrine, of the police power, either announced or intended to be announced in that case. There is therein no expressed or implied holding, or promise of holding, that the question of the constitutionality of a statute should or ever could, in any municipal community within the jurisdiction of the Federal Constitution, be finally decided by a referendum election of the citizens of that community.

#### THE JUDICIAL RECALL NOT REMEDIAL BUT SUBVERSIVE.

The Recall of Judges has the effect to subject judges to the constant menace of the arbitrary will of the voters of the judicial district in which they preside. It leaves to a mass meeting of voters, controlled by a majority of those who happen to be present, the arbitrary power to unseat a judge. The exercise of the recall in Oregon has shown that, despite the pretention to the allowance of a defense and hearing, the decision of the voters is controlled by hue and cry and that the system is merely a return to the ostracism of ancient democratic tyrannies. Its effect is only to lessen, to the point of destruction, whatever of independence is left to the judge by the judicial elective system. It invites, even compels, a judge to keep his ear to the ground and to anticipate the changing whims of popular passion. He is made a servant, not of the law, but a mere spokesman of the caprice of majorities. The system, therefore, is one which tends to eliminate the protective force of constitutional safeguards.

The Judicial Decision Recall is more directly subversive of our system of government. Its effect is to vest in the makers of a statute the power to dictate as to its enforcement, irrespective of the question whether or not it deprives any citizen or any set of citizens of their

liberty or property without due process of law. Indeed, the enforcement of such a statute under the decision recall is not left to its legislative authors, who may be supposed to have given to it some method of deliberation; its enforcement is left to a mass meeting of the electors of such legislature.

### THE COLORADO EXAMPLE.

The best illustration of the real significance of the decision recall is the Colorado example.

Under the recent Colorado amendment a supreme court decision declaring unconstitutional any state statute may be made ineffective by a majority of the votes cast by state electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the judicial decision recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide whether in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day, and another way another day, with reference to the same provision. One city might decide one way and at the same time another city another way, with reference to the same provision.

Now, what do you think of the wisdom or sanity of those pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive" methods, as merely "a new method of constitutional amendment by popular vote"?

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a *reductio ad absurdum* of the decision recall argument.

#### THE DECISION RECALL VOID AS UNCONSTITUTIONAL.

It is obvious that the decision recall, as illustrated in the Colorado amendment, is void as being repugnant to the federal constitution. The prohibitions of the federal constitution against any state statute impairing the obligation of the contracts or depriving persons of their life, liberty or property without due process of law, are made the supreme law of the land, binding by oath expressly imposed upon every federal and state judge. Subject to review by the federal supreme court, the final determination of the validity of such a statute rests with the highest court of the State. The federal constitution leaves open no alternative except the enforcement of the final decision of the courts upon the question of constitutionality. The arbitrary veto of such a decision by the voters of any judicial district is not only inconsistent with, but is repugnant to, our judicial system as established by and under the authority of the federal constitution. The decision recall by referendum ballot is not a judicial review. It is neither in form or substance an adjudication. It is, therefore, not within the power of the state, whether by statute or state constitutional amendment, to give to the voters of the state, much less to the voters of any subdivision of the state, the power either of arbitrary veto of a final decision of the courts or of arbitrary suspension of the enforcement of such a decision. It is, therefore, the duty of the courts to disregard and to declare ineffective and void any attempted exercise of such arbitrary veto by popular majorities at a referendum election.

The same reasoning applies to that peculiar constitutional provision of the same State forbidding certain courts from declaring in any case that a statute or ordinance is unconstitutional, when such statute or ordinance contravenes the federal constitution. The function and duty of every state judge, whether of an appellate or a *visi prius* court, is fixed by the terms of the constitution, and by his oath

under that constitution. It compels him in every instance when he deems a law, as applied to the case before him, to contravene the supreme federal law, *so to declare*, and in accordance with such holding to render his judgment or decree. That duty, imposed by the federal supreme law, can not be abrogated or diminished by state enactment, whether by constitutional amendment or by statute.

Speaking of the application of the Recall to the Judiciary, President Lowell, of Harvard, an eminent authority upon the history and science of government, says:

“If a judge is intended to render decisions that will be approved by the people at large, then he ought to be recalled if he fails to do so; but if his function is to administer justice without fear or favor, the recall is as much out of place as the decision of law suits by a mass meeting of citizens. The laws that he applies ought to be consonant with public opinion, but he ought to decide cases according to his conscience. If he is incompetent, corrupt, or in any way unfit for his high office, he ought to be impeached or removed after trial or hearing.”

The independence of the judge should not be assailed by making him at any time directly controlled by or answerable to a majority of those who may assume to pass upon him or his decisions. The protective features of our constitution should not be replaced by measures which allow the makers of a statute the privilege of dictating as to its enforcement. Our present system of government by law should not be replaced by a system of government by men. Judges should be the independent servants of the law. Judges and the entire judiciary should be maintained and supported only as servants of the law; their persons, their office and their decisions should be kept free from the influence of passion or prejudice; much more should they be kept free from the arbitrary control of temporary or local majorities. A judge should be free to act independently, and as said by Chief Justice Marshall, “with nothing to control him but God and his conscience.”

Gentlemen, I have spoken nothing that is new to you. It is not for any man, much less for me, to instruct you upon questions of constitutional law. You, the members of a state bar, which in learning, intelligence and patriotism is not surpassed by that of any other state in the Union, appreciate fully and approve in advance the conclusions which I have stated. But not so the general citizenship of this state and of this nation. The citizens of this state and nation should be forewarned against these poisonous and pernicious doctrines that, couched in alluring phrases, are sometimes advanced from high places. It is our duty as lawyers to make every voter within our reach realize the subtle menace of the advocacy of the judicial recall, to expose the arguments which are advanced in its favor, and to demonstrate in a practical, intelligible way its inadvisability and its dangers to the safeguards which were established to protect the rights of life, liberty and property of every citizen. The arguments which are advanced for the judicial recall, are, as we all know, self-answering. But it avails little that you or I know that. That fact must be known and recognized by the voters. They have a right to know it; and they have a right to know it from you. It is the duty of every one of you, of every one of us, to see to it that the fact be brought home to every voter,—that the arguments presented for the judicial recall are pure fallacies, that these measures are not progressive, that they are not remedial, nor constructive, but that they are subversive of every public and private right and interest which our constitutional government was established to safeguard.















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# GOVERNMENT BY JUDGES

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## ADDRESS

DELIVERED

AT COOPER UNION, IN NEW YORK CITY  
ON JANUARY 27, 1914

By

HON. WALTER CLARK

CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA



PRESENTED BY MR. OVERMAN

MARCH 24, 1914.—Referred to the Committee on Printing

WASHINGTON  
GOVERNMENT PRINTING OFFICE  
1914

**REPORTED BY MR. CHILTON.**

**IN THE SENATE OF THE UNITED STATES,**  
*October 21, 1914.*

*Resolved*, That the manuscript submitted by Mr. Overman on March 25, 1914, entitled "Government by Judges," an address delivered by Chief Justice Walter Clark, of the North Carolina Supreme Court, at Cooper Union, New York City, January 27, 1914, be printed as a Senate document.

Attest:

**JAMES M. BAKER, *Secretary.***

# GOVERNMENT BY JUDGES.

Address by Chief Justice WALTER CLARK, of the Supreme Court of North Carolina, delivered at Cooper Union, New York City, January 27, 1914.

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MY FELLOW CITIZENS: It has been said that a contented people have no annals. The present unrest among the people, not only in this country but the world around, strange as it may seem to some, is one of the best signs of the times. When people at large are content, they are either ignorant of better conditions or hopeless of attaining them. A "divine discontent" is the basis of civilization, and of all progress in bettering the condition of humanity.

Some one has said that "civilization is hell to the under dog!" Those who create the wealth of the world do not possess it, for they pass through the world with the barest living, and not always that, while those who do not create it have all of it except the mere subsistence of those who create it and of the other workers. We are fond of saying that this country is a "government of the people, by the people, and for the people"; that our Government rests upon the consent of the governed; that all power is derived from the people and is to be exercised for their benefit and in accordance with their will. This is the end toward which the world is moving. We shall some day realize that ideal, but it will be "far on in summers that we shall not see," for as yet we are merely "on our way."

All advance toward better conditions has been through a ceaseless combat between those who exploit and those who are exploited; between those who create the wealth of a country and those who take as large a share of it as they can grasp.

In this country, as in all countries, the control of the Government is in the hands of the few. Our institutions merely give an easier opportunity to the many whenever they have the will and the intelligence to improve their conditions. We have learned that the form of government amounts to very little. The real question is, Where does the control of that government reside?

In the countries of the Old World power was vested in an hereditary sovereign in whose selection the people had no voice and who needed no approval of his conduct, however arbitrary. In the process of time the wealthier classes were able to force recognition, and they became the nobility and hereditary legislators. When, in course of time, after long struggles and many revolutions, the class next below obtained recognition, they elected the lower house, as in England, but upon a suffrage restricted to the well-to-do and by a system which permitted the influence and the money of the government of the king and nobility to dictate the election of a majority of the lower house or their purchase by the bestowal of titles and money.

To this system as buttresses there was an army and navy whose best posts were filled by younger members of the nobility, while the



rank and file were composed of men from the exploited masses, conscripted or forced into service, and paid an insignificant amount, ranging from 2 to 20 cents per month. The Church was also a State institution, likewise paid for by the exploited millions, and whose higher positions were filled by the appointment of the younger members of the aristocracy.

Such, in brief, was the origin and the development of governments in the Old World. If there was discontent, the army and navy under the command of their aristocratic officers were used to shoot down the friends and relatives of the underpaid rank and file. And the thunders of the Church were used to frighten with threats of eternal condemnation and everlasting fires those who aspired to better their conditions in life and obtain some little larger share of the wealth they created. Those who objected to being exploited were shot in this world and officially damned in the next. Our plutocrats, lacking these facilities, have resorted to the infallibility of the Supreme Court.

In this country, in 1776, we issued a Declaration which was the sublimest that the world had ever heard. It proclaimed the rights of mankind and their equality and freedom. For seven years the people of this country sacrificed themselves to obtain a government based upon the principles of that great Declaration of Human Rights. And then, when the struggle was over, with sublime audacity the reactionary party—the champions of government of the many by the few—quietly, unostentatiously, but effectively, took control of the Government.

In 1787 there was assembled at Philadelphia a convention for the nominal purpose of creating better business and commercial relations between the States. A stronger Union was necessary. Taking advantage of this need, the reactionary element shaped the Constitution of the United States.

That instrument deserves an analysis. Our Government is divided into three great departments—the legislative, the executive, and the judicial. Of these three great departments which compose our whole scheme of Government, the control of only one-sixth, i. e., the election of the lower branch of the legislative department—the House of Representatives—was given to the people. Indeed, it was less than one-sixth, because the House of Representatives not having the confirmation of public officials or the treaty power and other privileges which were given to the Senate, is considerably less than one-half of the legislative department. Besides, the election of the Members of the House of Representatives was not granted to the people, as we now understand the word, for in no State was there “manhood suffrage,” but the right of voting was in most, if not in all, restricted by a property qualification, which in some States meant the ownership of land.

The other and the far larger part of the legislative department—the Senate—was chosen at second hand by legislators, themselves chosen originally by a restricted suffrage. It was soon discovered that the election of Senators was largely controlled by the great financial interests. Exceedingly few of them were ever frankly in sympathy with the masses. They were not in accord with the “under dog,” to whom they were not indebted for their seats and to show sympathy for whom would be a sure means of defeating a reelection. This was soon understood, and as far back as 1820, now more than

90 years ago, an effort was made to amend the Constitution to require the election of Senators and judges by the people. But so powerful has been the influence of the great corporations and the allied vested interests that it took 90 years for the people to win the right to choose the Senators who should represent them. The fight was not won until less than a year ago. The astonishing change in the tone of the Senate has already vindicated the wisdom of the people in persistently demanding this great change.

But to return to the Constitution of the United States as adopted in 1787. There was the provision for the election of the President. This was not given to the people, and it was intended that he should be elected at third hand by electors chosen by the legislatures of the different States, the legislatures being chosen, as already stated, by restricted suffrage. This system, however, has not worked out as intended. The people demanded that the electors should be chosen by themselves. This was done gradually as State after State made this change. After nearly 40 years the system of the legislatures electing the presidential electors was entirely done away with, except in South Carolina. In 1876 Colorado chose its presidential electors by the legislature, and it is still in the power of any State legislature to change the election of its presidential electors back to that method—if they dare to do it. As a result, however, the greatest constitutional amendment was adopted by popular action, without writing any amendment into the Constitution, for the people captured the right to elect the President by making the electors mere figureheads, and have ever since chosen their President by popular vote. Though each elector has the legal power still to cast his vote for his individual choice, no one has yet dared even in the most heated contest, as in the Hayes-Tilden election, to vote for a candidate other than the one for whom he was pledged to vote.

Now, let us turn to the third department of the Government, which in the beginning was considered of so little influence in the Government that Chief Justice Jay of the Supreme Court of the United States resigned to take the position of governor of New York, and the appointment to the Supreme Court was declined by more than one when tendered. The possibilities of the court were not understood, and indeed were unknown until its vast extension of power was grasped, without any grant in the Constitution itself, by an obiter dictum opinion in *Marbury v. Madison*. Those who drafted the Constitution at Philadelphia had been careful to place the judges beyond any influence of public opinion by making them appointive, at fourth hand, by the President, who was to be chosen at third hand, subject to confirmation by a Senate chosen at second hand, and they were to hold for life, so as to be free from any consideration whether their conduct was conformable to the will of the people, which last, with well-framed irony, was proclaimed as the "foundation stone" of the new Republic.

Nothing could be more absolutely out of accord with a republic than the appointment of officials for life. At the time, however, that this Constitution was adopted such was the tenure of judges in all the States but one, and in none of them were the judges chosen by the people, even under the restricted suffrage then obtaining. But it was soon discovered that the method of selecting judges meant practically their selection by the property interests, and that a life tenure ab-

m. 9. stracted them from all responsibility. As a result, State after State amended its constitution, until to-day the judges are elective in all the States but seven; and while they still retain the life tenure nominally in four States, they practically have that tenure in only one. For in the other three the judges can be dropped at any time by a majority vote of the legislature, without trial and without cause assigned.

The change from life tenure to a term of years and to election by the people was in effect the adoption of a modified recall, the necessity for which had been proven by experience. Not that the judges, either elective or appointive, either State or Federal, have been corrupt. To the credit of the bench it must be said that such instances have been exceedingly rare. But experience has demonstrated the absolute unwisdom of placing irreviewable power in the hands of any man or set of men by life tenure, no matter how wise or pure they may be. It had proved so in the past as to kings, though there had been some good kings, and it proved equally so as to life judges, for State after State abolished it. As to the United States judges, though bill after bill has been introduced into Congress to change their life tenure into tenure for a term of years, and their method of appointment into election by the people of the respective districts and circuits over which they preside, the influence of the great vested interests has postponed the adoption of the proposed measure.

The importance, indeed the overwhelming preponderance, of the judiciary in the Government was unexpectedly created in 1803 by a decision of the Supreme Court of the United States, without a line in the Constitution to authorize it, when that body assumed the right to nullify and veto any act of Congress that they chose to hold unconstitutional. This astonishing declaration was made in the case known as *Marbury v. Madison*, by Chief Justice Marshall. The doctrine was shrewdly set forth in an obiter dictum—that is, in an opinion which did not call for an execution of any mandate of the court—for he knew that Thomas Jefferson, then President, would not recognize the validity of the opinion nor put it into execution. He therefore laid down the doctrine that the court could, if it chose, declare that any act of Congress was unconstitutional, but wound up by deciding, notwithstanding, against the plaintiff, upon the ground that the Supreme Court was not authorized to issue a mandamus or writ to effectuate the views he had expressed. A few years later, in the matter of the Yazoo claims, when the court, through the same chief justice, held an act unconstitutional and directed the issuance of a writ in accordance with the opinion, Andrew Jackson, then President, pithily said: "John Marshall has made his decision, has he? Now let us see him execute it." It was accordingly never executed, and to this day has remained a blank piece of paper.

The assertion of this doctrine was promptly seized upon as a boon by the special interests and by all who at heart believed in the government of the many for the benefit of the few. It has practically made the courts the dominant power in every State and in the Union. Whenever any progressive statute has not been in accord with the economic views entertained by the courts, it has always been in their power, which has been very generally exercised, to declare that the statute in question was unconstitutional because it was not "due process of law," or "deprives of the equal protection of the law," and there

are other phrases which the judges use at will. Even *Magna Carta*, which was a treaty between King John on the one hand and 13 barons and 13 bishops on the other, in an attempt to restrict the absolute power of an irresponsible king, has sometimes been resorted to as being in some inconceivable way a heaven-born bar in the hands of the courts upon the power of the American people. The phrases above quoted are very elastic and mean just whatever the court passing upon the statute thinks most effective for its destruction. This, of course, makes of vital importance the inquiry, "What are the beliefs of the majority of the court on economic questions, and what happens to be their opinion of a sound public policy?" A power so great and so irreviewable, and therefore so irresponsible, has become the mainstay of the anti-progressive element.

The elastic and much extended phrase, "due process of law," historically and as a legal concept, relates only to procedure. It merely requires that the party shall have right to a regular trial according to ordinary procedure. In the Ives case (201 N. Y., 271) the court set aside an act providing for the compensation of workmen employed in eight inherently dangerous trades. This decision required an amendment to the State Constitution to overrule it. This is but one instance out of hundreds.

It is because of this intrusion of the economic views of the judges that the more recent State constitutions resemble rather a consolidated edition of the statutes than a declaration of the organic law and a frame of government. The judges have made it absolutely necessary that amendments to the Constitution may be made more easily in order to prevent the evil that is caused by their opposition to all progressive measures for the betterment of the public.

Prof. Corwin, of Princeton University, recently said that—

Due process of law is not a legal concept at all, but merely a roving commission to judges to sink whatever legislative craft may appear to them, from the standpoint of vested interests, to be of a piratical tendency.

Dean Trickett well said:

The legislators are elected to speak, and usually do speak, the people's will. The people will never be masters in their own house so long as a majority of nine gentlemen, pretending to have Marconigrams from the defunct men of 1787 and 1788 concerning their meaning when they adopted this or that phrase of the Constitution, arrogate to themselves the power of veto, and not merely refuse to aid in the enforcement of statutes, but even launch prohibition against the carrying out of these statutes by those who, unhindered by them, would legally execute them.

The fourteenth amendment, which was passed for the protection of the negro, has been construed as useless as to him, but it has become a tower of safety to the vested interests, who, seeing that suffrage was becoming more and more unrestricted, and that the President had been made elective practically by the people, and that they could not rely, as in Europe, upon an army officered by their sons, or the fulminations of a state church, were thrown back upon the Senate, chosen largely by their influence, and the appointment of judges for life, mostly from the ranks of attorneys who had been their employees.

The vested interests for 90 years held back the election of United States Senators by the people. Their remaining sheet anchor now is the selection of judges appointed by the Executive to hold for life. No one will accuse these judges of corruption, notwithstanding a



few alleged instances and a few impeachment trials. But the fact remains that the appointments to the Federal judgeships are very often made at the instance of influences which are exerted for great interests who feel the need of men in that position who believe in the sacredness of their vested rights. These appointees, as a rule, have been men of ability, but men who, because of their ability, have been retained in the service of great corporations. When these men who have spent their professional life in advocating the decision of causes from the standpoint of their employers are translated to the bench, they naturally continue to view such questions from the same standpoint. This is not corruption on their part, for the more honest their convictions the more tenaciously they will assert those ultra views in their opinions on the bench. The complaint is not of corruption, but of usurpation of control over the lawmaking power, which, under the Constitution, should be in the people. In England, when the people have put a measure through Parliament over the power of the aristocracy, there is an end, for there is neither executive nor judicial veto. Here the interests resort first to the executive and then to the judges to defeat the popular will.

A well-known book gives the secret history of the Dartmouth College case and the methods by which the original views of the court in that case were changed in favor of the vested interests. The true inside history of the methods used to change the court in the income tax case might shock the Nation, if generally made known.

It would be well to inquire just here what authority there is in the Constitution for the assertion of such remarkable power, by which five lawyers sitting in Washington can negative an act of Congress passed by the House and Senate, and approved by the President, and overruling the precedents of the court on which they sit, and overruling, besides, the views of four judges on the same bench, as happened in the income tax case.

There is not a line in the Constitution which authorizes the assumption of this unlimited power by the court. Nor is there a line in any State constitution which so authorizes it. The members of the legislatures and of Congress, governors and presidents, are equally with the judges sworn to observe the Constitution. There is no intimation that to the judges was given the power to negative the exercise of their sworn duties by these other officials, and the presumption was that all equally would obey the Constitution. There was no preeminence given the judges. When Congress, or a legislature, passes a statute, it is a construction by the majority of those bodies that it is constitutional. When the President or the governor vetoes or approves it, the presumption is that he has acted according to his construction of the Constitution; but as the presumption is that the greater number of men are better informed than one, by the constitutions of the States (and the Federal Constitution) in which the veto power is given, there is power lodged in the legislature or Congress to overrule a veto, by a vote ranging from a bare majority to a two-thirds vote. If the executive, or the legislative departments disregard their oaths, the remedy is correction by the people at the next election. If the judges make a mistake in vetoing a statute, there is no power to correct them, especially if holding for life. Had the Constitution given the judges the power to set aside

a statute, it would have given the legislature the same power as in case of the executive to overrule their veto. Had it been supposed that such power for the judges was concealed in the Constitution, it is safe to say that it would not have been ratified by a single State.

This power when assumed by the judges in *Marbury v. Madison* was without a precedent in any other country. It had never been dreamed of before in any other country that the judges would assume governmental functions and negative the action of the men who were intrusted with the lawmaking duties. It had been attempted only once in England, and then they very promptly hung the chief justice (Tressilian) and exiled his associates. And the feat was never attempted again by any subsequent judges. Indeed, in England for a long time the judges were removable at the will of the King, and when that was abandoned they were made removable by a majority vote of Parliament without trial and without cause shown. This is the law in England to this day. If the judges had attempted any such decision as our court made in *Marbury v. Madison*, in the *Dartmouth College* case, or in the *Income Tax* case, and similar cases, the lawmaking power would have at once vindicated its rights by the prompt removal of the judges.

Neither was the power granted to the United States judges by the convention at Philadelphia in 1787. The reactionary element which was in charge of that convention was not inadvertent to the great advantage of an irreviewable body having power to negative the will of the people. They attempted to get into the Constitution a provision to that effect. When that convention met, to protect themselves from any influence from public opinion and in defiance of the maxim that government should exist only by the consent of the governed, it sat with closed doors. The members were sworn not to make copies of any resolution or other action or to correspond with constituents or communicate with others as to any matters pending before the convention. Any record of yeas and nays was forbidden; but fortunately one was kept without the knowledge of the convention. The journal was kept secret, and the motion to destroy it fortunately failed by one majority. Mr. Madison's copy was published only after the lapse of 49 years, when every member had passed beyond human accountability. Only 12 States were ever represented, and one of these withdrew before the final result was reached. Of its 65 members, only 55 ever attended, and so far from being unanimous, only 39 signed the Constitution, and some actively opposed its ratification by their own States. In several States ratification was had by the barest majority. In New York, I believe, a majority of one for ratification was had by persuading a member of the legislature to absent himself. Its ratification by the required number of States was secured only by a pledge to adopt the first 10 amendments which guaranteed the rights of man, a subject which had been wholly omitted. In no State was there any ratification by a vote of the people.

Even in such a convention, thus composed and thus secluded from the influence of public opinion, the persistent effort to grant the judges such power was repeatedly and overwhelmingly denied. The proposition was made, as we now know, from Mr. Madison's journal, that "the judges should pass upon the constitutionality of acts of Congress." This was defeated June 4, receiving the votes of

only two States. It was renewed no less than three times, i. e., on June 6, July 21, and finally again, for the fourth time, on August 15, it was brought forward, and though it had the powerful support of James Madison, afterwards President Madison, and James Wilson, afterwards a justice of the United States Supreme Court, the proposition at no time received the votes of more than three States. On this last occasion, August 15, Mr. Mercer thus summed up the thought of the convention, as evidenced by its vote:

He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought the laws ought to be well and cautiously made, and then to be incontrovertible.

Though the doctrine that a court could set aside a statute and deny the authority of the lawmaking power was not recognized in England or any other country, shortly before the convention met the courts of four States, either because averse of power or because they thought themselves a substitute for the authority which before the Revolution had been exercised by the privy council in England of refusing approval to the statutes of our Provinces, had asserted such authority. In Rhode Island the offending judges, who were elected annually by the legislature, were dropped, and the doctrine in other States met with disapproval. These decisions were recent, and Madison and Wilson knew, as the convention did, that they were endeavoring to confer the same power on the Federal Supreme Court, and though it was persistently presented by them on four several occasions, it was thus overwhelmingly defeated.

While friends of this doctrine of judicial supremacy over the other departments of the Government have ingeniously argued in divers ways that the doctrine can be construed into the Constitution, these votes are conclusive that the convention refused to put it there. It is not reasonable to suppose that when the convention gave the President the veto power, but expressly provided that he could be overruled by two-thirds vote in Congress, that they would have given by implication a greater veto to the judges without expressly so stating and without making their action reviewable, as in the case of the presidential veto.

However plausible the arguments in favor of judicial supremacy, its friends can not point to a line in the Constitution which confers it. The only words that can even be construed as giving them any power is the provision that "the Constitution of the United States and the laws made in pursuance thereof shall be supreme." That does not authorize the court to hold any act of Congress unconstitutional, but it means that when a State statute or constitution conflicts with the Federal Constitution and statutes enacted by Congress under its authority, the latter shall govern, just as a later act controls an older one.

Even in *Marbury v. Madison*, Judge Marshall did not claim that any express provision of the Constitution conferred this power, but derived it by implication. Indeed, freed from the prepossessions derived from our long acquiescence in the doctrine, nothing could be more preposterous than the proposition that five lawyers can in their discretion set aside the will of the people as expressed in an act by the Senate and House and approved by the President, and that when this is done the hundred millions of the American people are powerless in any way to review such decision.

If I were speaking to a body of lawyers, I could name case after case in which this has happened, and point out the bar upon progress and upon the amelioration of the conditions of the masses which has resulted therefrom. If I were to quote to you the comments made by Thomas Jefferson upon some of these decisions, the remarks of Andrew Jackson, of Abraham Lincoln, and of others upon the exercise of this usurped power, it would make your ears burn.

Governor Baldwin, formerly chief justice of Connecticut, and a staunch defender of high prerogative in the courts, recently admitted that—

This right of a court to set itself up against the legislature \* \* \* is something which no other country in the world would tolerate.

Mr. Justice Harlan has well said:

When the American people come to the conclusion that the judiciary of this land is usurping to itself the functions of the legislative department of the Government and by judicial construction only is declaring what should be the public policy of the United States, we will find trouble. Ninety millions of people—all sorts of people—are not going to submit to the usurpation by the judiciary of the functions of other departments of the Government, and the power on its part to declare what is the public policy of the United States.

I need not now refer to the case of *Chisholm v. Georgia*, in which the court haled a sovereign State, like a private individual, to the bar, and an indignant people promptly prevented the recurrence of such a spectacle by enacting the eleventh amendment, as to which the court as late as 1890, in *Hans v. Louisiana*, 134 U. S., 11, said: "This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court." This has happened since in the reversal of the income tax decision by the sixteenth amendment. I will not refer to the *Dred Scott* decision, which was so roundly denounced, but which has since been cured by the thirteenth, fourteenth, and fifteenth amendments. I will cite only two cases.

The people of New York, through their legislature, felt aggrieved that the bakers in their State were subjected by the greed of their employers to enormous heat for an excessive number of hours, to the shortening of their lives, and passed a statute limiting such labor to 10 hours per day. The act was promptly attacked by that interest, supported by the influence of other vested interests which feared similar legislation. But the State Court of Appeals, elected by your own people, in *Lochner's* case, affirmed the power of your State to make such regulations. Those great interests at once took the case by appeal to the United States Supreme Court at Washington. It was purely a matter of police regulation, and the Federal court had no jurisdiction over the matter. But they usurped it by the flexible terms of the Fourteenth amendment, which mean anything and everything that the judges see fit, and which can be used to destroy any legislation that they do not approve, and then five judges, the majority of the court, though the four ablest judges dissented, proceeded to tell the bakers that they must work as long as their employers should require, and in ovens as hot as they chose to heat them. With sardonic irony they added that they did this because the bakers had a "right to contract." *Lochner v. N. Y.*, 198 U. S., 45. This was adding insult to injury, for every one knew that the

*thanks  
Brewer  
Ch.*

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// decision was not in the interest of the bakers, whom the legislature was trying to protect, but in the interest of the employers, who did not wish to be controlled by the public in their greed.

It would have been a revelation to the men who passed the Fourteenth amendment to protect the negro to find it construed as holding white men in slavery by prohibiting legislatures from limiting the hours of labor or forbidding insanitary and dangerous conditions.

Mr. Justice Holmes, who was one of the four dissenting judges in the Lochner case, in *Bank v. Haskell*, 219 U. S., 111, speaking for the court, thus finely defines the police power which is reserved to the States: "The police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or the strong and preponderant opinion to be greatly and immediately necessary to the public welfare." This power belongs to the States, and it was judicial usurpation when the United States Supreme Court overruled your State statute.

Then there was the income tax case. This tax had been held legal by the court for 100 years. Under it, during the war, hundreds of millions of dollars had been collected to aid in saving the Union. After long insistence by the people, that great wealth was escaping its due share of taxation, while labor and men of modest means bore nearly the entire burden of supporting the Government, a new income tax was enacted, in spite of the influence of a powerful lobby and of a large part of the press, which ridiculed, after being duly inspired, an income tax. In England one-third of the support of the Government was derived in this way from the superfluities of the wealthy by the levy of a graduated income tax and a graduated inheritance tax, increasing the per cent with the size of the income. The same system was in force in all other countries, as it had been in ours. The bill passed the lower house of Congress unanimously, and I believe there were only one or two votes against it in the Senate. The President, who was a good lawyer, approved it. The plutocracy of the country was opposed. The matter was brought before the Supreme Court of the United States. That court at first affirmed the validity of the act in accordance with all the precedents. Suddenly, one judge changed his views. Information was imparted upon which a rehearing was asked and then by a vote of five to four the act was held unconstitutional and set aside, to the amazement of the whole country and of all foreign nations. By what means this changeable judge received wireless information as to the views of the 39 dead men who signed the Constitution of 1787 has never been known. Certainly he had no respect for the opinions of the preceding judges on that bench who had held otherwise, nor of his four dissenting brethren, nor for his own opinion as expressed on the previous hearing. The result was that the vote of that one man put the Congress and the President into the absurd, not to say wicked, attitude of having passed a law in violation of their oaths to support the Constitution. He also showed a most profound contempt for the 80,000,000 of people who then constituted the United States, but a great regard for the interests and views of the two or three hundred thousand owners of great wealth. The result was that by his vote he transferred over \$100,000,000 of annual taxation from the very rich, who were the most able to pay it, and placed this burden upon the masses, who already paid more than their share of the burdens of

In his address as printed and even dated 1904 he wrote of this from the Lochner case

shut

government. His change of mind has thus up to date caused the masses to pay probably three thousand million dollars, which under the will of the people as expressed by the vote of Congress and the approval of the President should have been placed upon those most able to pay it.

*The power, thus construed to be in a court, or indeed in the hands of one man, to accomplish such an act as this without any review or possibility of review and without any words in the Constitution conferring it, is so exorbitant and unprecedented that it needs no argument to demonstrate that it ought not to be tolerated, and can not safely be permitted to continue. Not the Czar of Russia, nor any other potentate, would have dared to perpetrate such an act.*

It may be interesting to note the origin of the doctrine of judicial supremacy over the lawmaking power as it originated in *Marbury v. Madison*, in 1803, 16 years after the formation of the Constitution. The South was aware that the greater increase in population at the North would give that section control over the House. For the protection of its slave property by the Senate it kept up the process of always simultaneously admitting one slave State and one free State till this could be no longer continued. The South also secured the election of a southern President or of a "northern man with southern principles," up to the election of Lincoln. Its last defense was the power which Marshall had assumed for the court, to set aside acts of Congress. The longer use of such power was jeopardized in 1861 by the election of Lincoln, who had denounced the *Dred Scott* decision, and by the old age of Taney, who died, indeed, in 1864. Thus for 63 years from 1801 to 1864 two southern Chief Justices, Marshall and Taney, together with associates of their way of thinking, held to the theory that legislation by Congress hostile to property rights and slavery could be vetoed by the court.

It is thus singular that this doctrine which was largely a precaution for the protection of property in slaves, and the fourteenth amendment which was passed for the opposite purpose of protecting the negro, have both become the refuge and safeguard of the interests. Neither now subserve their original purpose.

This doctrine is based upon the idea that though a majority of the Senators who are sworn to serve the Constitution may either viciously or ignorantly violate the Constitution in the passage of an act, and though a majority of the House may do the same, and though the President may also either viciously or negligently violate his oath of office by failing to veto an unconstitutional act, and a minority of the court itself may do the same, the five men who constitute the majority are infallible and will never do so, not even when they reverse their predecessors, or, as in the *Income Tax* case, their own court.

Marshall was a great judge and rendered many valuable decisions. But as a matter of history we know that he had strong bias and, like other men, some faults. He was Secretary of State in January, 1801, when appointed Chief Justice and took his seat on the bench. Yet he held both offices up to the night of March 3, 1801, when his office as Secretary of State expired. It was he who, at midnight, signed the commission to *Marbury*, which he left on the table because unable to deliver it before the clock struck 12, for *Levi Lincoln*, the new Attorney General stood by him (as *Parton* says) with

Mr. Jefferson's watch in hand and forbade him to proceed. It was this commission which he sought to validate as Chief Justice when a mandamus was asked to compel Madison, the new Secretary of State, to deliver it. He did not issue the mandamus. If he had, there might have been impeachment proceedings which would have nipped this doctrine in the bud, as was done in England by the execution of Chief Justice Tressilian and the exile of his associates.

I would not have anyone in this audience misunderstand me. I am not arguing that the Supreme Court of the United States, or any other judges, were not able and incorruptible because they have differed with me in this matter. Nor does the fact that Thomas Jefferson, Andrew Jackson, Abraham Lincoln, William J. Bryan, Theodore Roosevelt, and thousands of others have denied the existence of this power in the judiciary put the judges in the wrong. But the fact that judges are able and conscientious does not confer such power when it can not be found in the Constitution.

Men of ability are not free from errors, nor from being influenced by love of power. However conscientious they may be, placing them on the bench does not change their nature nor the views which while at the bar they have entertained of the sacredness and superiority of vested property rights over human rights.

It is true that the audience before me, however respectable, is not the people of the United States. At Syracuse there was a large prison in which every utterance, however low, could be heard by the custodian of the King. It was known as the "Ear of Dionysius." New York is the great and throbbing center of this country—its "Ear of Dionysius." What is said here, and on an occasion like this, if it deserves any consideration, will be heard and considered all over this country. To you, therefore, I have submitted these views for your judgment, as the representatives of the people who are and ought to be the supreme power in the Republic.

Even Mr. Taft, who was long a judge and who is on record in favor of judicial high prerogative, has said:

If the law is but the essence of common sense, the protest of many average men may evidence the defect in a legal conclusion, though based on the nicest legal reasoning and profoundest learning.

Mr. Herbert Croly says:

*Look up  
majorities* Every popular government should, in the end, and after a necessarily prolonged deliberation, possess the power of taking any action which in the opinion of the decisive majority of the people is demanded by the public welfare.

Many judges have concurred in and written opinions holding statutes unconstitutional, because, though this power was never conferred, it has been supported by long acquiescence; and legislatures have passed many statutes, which otherwise would not have been enacted, by salving their consciences with the statement, "If the act is unconstitutional, the courts will set it aside." I am not attacking the judges for doing what most, if not all, of them have done. But I support the proposition that such authority has never been conferred by the Federal or any State constitution; that its exercise is dangerous, and especially so as to the judges themselves, and that it rests solely upon long acquiescence and not on any authority in the Constitution. We have seen lately a formidable movement for the recall of the judges and a recall of judicial decisions, and a growing antagonism on the part of the masses, who are coming to view the courts with

distrust and as being hostile to all progressive movements for the betterment of their condition.

We can not claim that we are necessarily governed by the people because of our form of government, nor that our officials are really chosen by the people or are responsive to their will. After the Revolution, as I have said, the suffrage was very much restricted. Manhood suffrage was practically unknown. Without going into the details in the different States, I may cite the constitution in North Carolina. In that State, down to 1855, no man could vote for a State senator unless he owned 50 acres of land. Men who owned less, or no land, were not deemed possessed of sufficient intelligence or patriotism to exercise that right. Down to 1836, our governor and all State officials were chosen by the legislature. And the judges were chosen in the same mode, and for life, down to 1868. For 60 years our sheriffs, clerks of the court, coroners, and other officials were appointive or elected by the magistrates, or legislature. Changes in this respect to popular vote took place in other States, some earlier and some later than with us. While the change has broadened the influence of public opinion, we have not yet reached the point where the control of any State government or of the Federal Government is really in the people.

In the last analysis, our Government is very largely a plutocracy. Our nominations are made largely by party machines, which more or less in different localities are supplied with the bulk of their funds by great interests, which are thus enabled to dictate in a large degree nominations by each of the political parties, leaving the people to take their choice between candidates of like sentiments as regards the interests. This is being more generally understood, and hence the widespread agitation in favor of the initiative and the referendum, and of legalized primaries, and of other measures intended to place the real power in the hands of the people. Only experience can decide how far the politicians can "beat" these measures, and how far they can be made effective by remedying the defects which shall be found in them after trial. In many States the machines have, so far, prevented the people from even testing the efficacy of these measures. In others, the measures are on the statute book, but time alone can demonstrate, as already said, how far they can really place the Government of this country in the hands of the people.

In reference to "Government by Judges" who hold the ultimate power in this country, since there is no power to review or annul their action when they set aside legislation, I will call attention to the measures which have been proposed for curing this evil:

(1) One of the remedies proposed, as to the United States judges, is to change the undemocratic life tenure into tenure for a term of years and to make them elective by the people; that is, that the district judges shall be elected by the people of their respective districts, and the circuit judges by the people of their circuits, as in most of the States, and that the country shall be divided into 9 divisions, for each of which a judge of the United States Supreme Court shall be chosen by the people thereof, and that the judges shall, from their number, elect the Chief Justice. Such an amendment has been repeatedly offered in Congress, but the powerful influences in favor of the present system have so far prevented its adoption, as for 90 years they prevented the passage of the amendment to make the



Senators elective. As this change has been made in nearly every one of the States, there can be no question that it meets popular approval and that it should be adopted. It is, so to speak, a modified recall, in that it submits a judge's conduct to popular approval at stated intervals. It will not, however, cure the entire trouble. The judges of most of the States have been made elective and for a term of years. This has proved beneficial (for the continuance of the former system had become unbearable), but will not cure the evil entirely as long as the judges retain their assumed power of an irreviewable veto upon legislation.

(2) Another remedy proposed, and which has been supported by Mr. Bryan and other trusted leaders, has been the "recall of the judges." This has been adopted in California, where for 40 years the railroads and other interests practically dictated the nomination and election of the majority of the judges, and dictated many decisions. So intolerable was the condition in that State that when an amendment to this effect was submitted to the people it was adopted by more than 100,000 majority. The same provision has been adopted into the constitutions of Oregon, Arizona, Nevada, and Colorado, and has been submitted to the people for ratification in Kansas and Minnesota. In Arkansas it was adopted by the people, but the court set it aside on a technicality. When Mr. Taft refused to approve the bill admitting Arizona as a State because it contained this provision, the people of that State wisely submitted to his arbitrary conduct; but immediately upon becoming a State submitted and passed an amendment reinserting that provision.

The recall of judges is by no means a new feature, except in the fact that it is to be made by the people. In England they have had this recall ever since 1688, for though the judges are nominally appointed for life, they hold subject to a provision that they can be removed at will and without cause by a majority vote in Parliament.

We will come a little nearer home. In Massachusetts they have always had exactly the same provision in their constitution. When in 1820 there was a convention to revise their constitution, Daniel Webster and others who represented, as he did, vested interests, earnestly pleaded to strike out this provision, arguing that it would make the judges subservient to any passing gust of the popular will. But Massachusetts had a better opinion of her people and of her judges. The convention refused to strike out the provision, which is still in their constitution. In England and in Massachusetts and other States which have such a provision, it has not been often, if ever, used; but, in the language of Mr. Wilson, it has been, it seems, a good "gun behind the door."

The recall of the judges is unnecessary where they hold for a term of years, and not for life, provided they are really nominated and elected by the people. The recall as applied to the judges is objectionable, in my judgment, for many reasons, and among them this, that it can be applied to cases of ordinary litigation where the judge is exercising only his legitimate judicial function. If as to such matters he proves corrupt, he can be impeached; and if he proves feeble, he can be dropped at the end of his term. The other proposed remedies, which are set out below, have the great advantage that they apply to prohibit, or to review, the courts only when they attempt to exercise legislative functions by setting aside acts of the

legislature or Congress without any constitutional authority in themselves to do so.

(3) There is the remedy which has been ably advocated by Mr. Roosevelt, which is commonly called by its opponents the "recall of judicial decisions." In substance, however, it simply applies to the decisions of the courts on constitutionality of statutes the same remedy that the Constitution now gives as to the veto of the President, to wit, that the statute which has received a judicial veto shall be submitted to Congress, or the legislature, as may be, and if the court's veto is overruled by the same vote that is required to overrule an executive veto, the statute shall be held in force. There can logically be no objection to applying to the judicial veto that has been assumed without express authority the method that is given to review the expressly conferred executive veto.

(4) Another remedy, still, is a suggested amendment that the courts shall not be permitted to hold any statute unconstitutional. Seeing that in every legislature and every Congress the members are sworn to obey the Constitution equally with the judges, and that in those bodies there is always a large number of lawyers, and other men of equal ability to the judges, there is no reason that we should not conform our procedure in this matter to that of England and all other countries which have always denied to the judges any control over legislation, and which have always refused the courts the overwhelming power of an irreviewable veto upon legislation which our judges have assumed. In Ohio their recent constitution has modified this suggestion by providing that the courts shall hold no statute unconstitutional if more than one judge dissents.

This would seem logical, even if the judges rightfully possessed the veto power, because the United States Supreme Court has always held that no statute should be declared unconstitutional unless it was so "beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat., 269. In practice, however, we may observe that the court held the income tax unconstitutional when all previous courts, and indeed the same court in that very case, had held that statute constitutional, and the opinion in favor of its unconstitutionality was by a vote of 5 to 4. Upon this showing, certainly, its unconstitutionality was not "clear beyond a reasonable doubt." But men possessed of irreviewable, irresponsible powers are capable of strange reasoning and strange conduct, and judges are no exception.

(5) But irrespective of the slow process of constitutional amendment, which the interests will fight in every State legislature, there is a remedy at hand and already in the power of Congress, if they choose to exert it.

As to judges below the Supreme Court, they are created not by the Constitution, but by an act of Congress. Congress can, therefore, abolish any district or circuit at will. It has abolished several districts, and in 1802 it abolished sixteen circuit judges at a blow. It is, therefore, in the power of Congress to exercise the same power that is possessed by Parliament in England and by the legislature under the constitution of Massachusetts and some other States, of dropping the judges by a majority vote, with the approval of the President.

Nor is Congress without power as to the Supreme Court, for the Constitution provides that, except as to the few cases in which the

Supreme Court has original jurisdiction, it shall have appellate jurisdiction "with such exceptions and under such regulations as Congress shall make." It is, therefore, entirely within the power of Congress to deprive the courts of assuming jurisdiction to hold any statute unconstitutional. Such an act was held constitutional by the court itself in the *McCardle* case (7 Wall.), in which Congress deprived the court of jurisdiction of an appeal by an act passed even after the appeal was taken and the court held that they were disabled to proceed. Indeed, the court recognized this power in *Marbury v. Madison*, the very case in which the extraordinary doctrine of the judicial veto was first put forward, for after declaring the statute unconstitutional, the court wound up by holding that it could not put its opinion into effect, because Congress had not authorized them to issue any writ to execute their judgment by a mandamus, which would have been necessary in that case.

I have thus addressed you, my fellow citizens, on great questions which deserve your consideration in view of a determination on the part of a large portion of our fellow citizens to have a fairer share in the opportunities of life. The progressive and humanitarian measures necessary to the betterment of their condition are almost invariably negatived by the courts, whose sympathies are usually with the propertied class and vested rights. So far, you have had to meet this by the slow process of constitutional amendments, as in the *Ives* case in your own State and other instances, and the same has been true in other States. I have cited the amendments to the Federal Constitution, one of which, as to the income tax, has after 20 years of wrong, cured one of the worst decisions ever rendered by our highest court. I could not, however, condemn it more strongly than was done in the opinions of the four dissenting judges in that case and as it should be condemned by any impartial man.

All the rest of the world "live, move, and have their being" without the irreviewable control and supervision of judges over the other departments of the Government. The adherents of "big business" (and of the special interests assert that we have always had it here (since 1803), and that we will go to ruin if we dispense with it. Of course we shall, unless our people are capable of self-government—as we asserted in 1776.

"If there is anything which may be said to be axiomatic in American constitutional law, it is the proposition that neither of the three departments of Government can rightfully interfere with the workings of either of the others. It is to be profoundly regretted that this salutary principle was first violated by the judicial department in *Marbury v. Madison*." This is a remark of the late Judge Seymour D. Thompson in an admirable address before the Bar Association of Texas in 1896 (30 Am. Law Rev., 678). After referring to many cases in which the court had exercised authority beyond their rightful powers, he thus sums up, in language which I reproduce for its intrinsic power. Judge Thompson said:

There is danger, real danger, that the people will see at one sweeping glance that all the powers of their governments, Federal and State, lie at the feet of us lawyers—that is to say, at the feet of a judicial oligarchy; that those powers are being steadily exercised in behalf of the wealthy and powerful classes and to the prejudice of the scattered and segregated people; that the power thus seized includes the power of amending the Constitution; the power of superintending the action, not merely of Congress, but also of the State legislatures; the power of degrading the powers of the

two houses of Congress, in making those investigations which they may deem necessary to wise legislation, to the powers which an English court has ascribed to British colonial legislatures; the power of superintending the judiciary of the States, of annulling their judgments and of commanding them what judgments to render; the power of denying to Congress the power to raise revenue by a method employed by all governments; making the fundamental sovereign powers of government, such as the power of taxation, the subject of mere barter between corrupt legislatures and private adventurers; holding that a venal legislature temporarily invested with power may corruptly bargain away those essential attributes of sovereignty, and for all time; that corporate franchises bought from corrupt legislatures are sanctified and placed forever beyond recall by the people; that great trusts and combinations may place their yoke upon the necks of people of the United States, who must groan forever under their weight, without remedy and without hope; that trial by jury and the ordinary criminal justice of the States which ought to be kept near the people are to be set aside and Federal court injunctions substituted therefor; that those injunctions extend to preventing laboring men from quitting their employment, although they are liable to be discharged by their employers at any hour, thus creating and perpetuating a state of slavery. There is danger that the people will see these things all at once; see their enrobed judges doing their thinking on the side of the rich and powerful; see them look with solemn cynicism upon the sufferings of the masses nor heed the earthquake when it begins to rock beneath their feet; see them present a spectacle not unlike that of Nero fiddling while Rome burns. There is danger that the people will see all this at one sudden glance, and that the furies will then break loose, and that all hell will ride on their wings.

These were the words of a very wise and just judge. There are those who will heed them and there are those who will mock at them. To my brother judges who may hear them to-night, or who may read them, I would cite the instance of the 10 virgins of whom Supreme Wisdom said: "And five of them were wise and five of them were—not."







# LETTERS

August 7-14, 1914

**EVERYBODY'S MAGAZINE TO ROME G. BROWN**  
**and**  
**ANSWER THERETO.**

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**Confidential to Members Judicial Recall Committee:**

I received from Everybody's Editor the enclosed smug and covertly threatening note. As it, and my answer, refer to work done by me as chairman of our Committee, I am sending you copies. Maybe 'twill interest you.

R. G. B.



**EVERYBODY'S MAGAZINE.**  
**Spring and MacDougal Streets,**  
**NEW YORK.**

**Editorial offices.**

**August 7, 1914.**

**My dear Sir:**

I have just had brought to my attention a copy of the *Morning Star* of Wilmington, North Carolina, reporting a speech which you made before the North Carolina Bar Association on the 30th of June.

I observe that in one paragraph you call attention to a certain article published by EVERYBODY'S MAGAZINE two years ago by C. P. Connolly. It will interest you to know, I am sure, that no controversion or criticism in the nature of a denial of the facts or a request for correction as to what was said of any person was ever made. Also it will interest you to know that the periodical which published Mr. Carruthers Ewing's speech was promptly sued for libel by Mr. Connolly, and the suit is now pending in the courts here.

**Yours very sincerely,**

**(Signed) Trumbull White,**

**Editor.**

**Mr. Rome G. Brown,**  
**Minneapolis, Minnesota.**

**BROWN & GUESMER,**  
**1006-12 METROPOLITAN LIFE BLDG.,**  
**MINNEAPOLIS, MINNESOTA.**  
**ROME G. BROWN**  
**ARNOLD L. GUESMER**

**August 14th, 1914.**

**Mr. Trumbull White,**  
**Editor Everybody's Magazine,**  
**Spring & MacDougal Streets,**  
**New York, N. Y.**

**Dear Sir :**

**In answer to yours of August 7th :**

**Referring to the articles by C. P. Connolly in your magazine of two years ago you say :**

**"It will interest you to know, I am sure, that no contro-  
version or criticism in the nature of a denial of the facts  
or a request for the correction of what was said of any per-  
son, was ever made."**

**If you are confining yourself to what has not come to you personally, I would not pretend to contradict your statement. I would, however, suggest the reason why the victims of the calumnies perpetrated by your magazine, and the friends of those victims, felt that it was hopeless to credit your editorial department with sufficient good faith to give any communication which they might make either fair, dignified, or honorable treatment. There are poisons and stench, sometimes communicated by active agents, the sources of which are of such a nature that, while in fact casting no real stigma upon the victim, they nevertheless cause him, temporarily at least, injury and embarrassment. They are, too, sometimes of such nature that it is wiser for the victim to bear his affliction than to risk further contact of any kind with the foully contaminating cause. Your demonstrated imaginative powers will not fail to serve you in this instance and will, therefore, suggest more specific illustrations of the comparisons which I have in mind.**

**If your statement is intended to be as broad as its terms, I deny its truth. Connolly's allegations have been very widely controverted and criticized, both by denial of the facts which he pretends to state, and by detailed statements showing, not only their incorrectness, but that they were in a considerable degree willfully and maliciously false. In my opinion, many of them were so palpably false that the editors of your magazine**

can never escape the charge, which now has become the settled judgment of the entire American Bar, that, for the purpose of catering to the growing number of sensation-mongers, and thereby for the sordid purpose of increasing your circulation, you deliberately prostituted your Magazine in the vilest manner possible, when you published the Connolly articles. You were not only willing to shock the sense of decency of enlightened and intelligent citizens, but you sought to do so, on the theory that the greater the indecency, the greater the sensation. This is the view which informed and intelligent people of America have of your publication of these articles. This fact, however, can be of little interest to you, for the articles were published for, and addressed to, the too great mass of unthinking people,—that is, people who are not sufficiently informed to discern at a glance their falsity. These articles were intended to appeal to those who would be misled by them, or to those who were of the same vicious disposition as the one who wrote them or as those who consented to their publication. The grains of truth sparsely scattered through these articles were intended only, and in fact served only, as instruments for perpetrating upon the average reader the fraud and deceit manifestly purposed by both author and publisher.

In your letter to me you also say :

“Also it will interest you to know that the periodical which published Mr. Carruthers Ewing’s speech was promptly sued for libel by Mr. Connolly, and the suit is now pending in the courts here.”

This fact does interest me. It may also interest you to know that I have known of this so-called libel suit, ever since it was started. A man of such lack of sense and of such shameless audacity as Mr. Connolly has demonstrated himself to be, would be expected to attempt to exploit himself still further by instituting a libel suit. The spirit of your letter to me shows that you personally, as Editor of Everybody’s, would today pretend to claim that Mr. Connolly was justified in writing the articles, and that you were justified in publishing them, and, therefore, that his complaint in his libel case had merits. You mistake obstinate persistence for consistency; and you wish to demonstrate your consistency. You lack either intelligence or sincerity. In order not to offend you, let me say frankly that I believe you are intelligent.

As proof of my knowledge of this pretense at a desire to litigate, which you term a libel suit, it may interest you to know that, so long ago as June 26th, 1913, I went from Minneapolis to Memphis, Tennessee—and for no other purpose so far as my

selfish desires were concerned—personally to congratulate Mr. Ewing and the Tennessee Bar upon the fact that he had been by a libel suit accredited with that versatility, that power of imagination, that inventive genius, which would enable him to libel the most despicable muckraker then known in modern journalism. I also then publicly stated that Mr. Ewing had told the truth about Mr. Connolly. I said some other things about him and about your publication and about publications of the same type, which it may interest you to know. I therefore enclose copy of my address before the Tennessee Bar Association, which you will note has been repeated on more than one occasion. I also send you address before the Oklahoma Bar Association on December 29th, 1913, in which you will see I commended Mr. Ewing and denounced Mr. Connolly and your magazine. I also send you copy of my address before the Denver Bar February 21st, 1914, in which, it will interest you to know, I included my former remarks concerning the same subject. I also send you my address at Wrightsville Beach, North Carolina, June 30th, 1914, which you will note was also delivered before the Texas Bar and the Indiana State Bar and other places, which is the address referred to in your letter to me.

It may also interest you to know, that the circulation throughout the United States of these addresses, in pamphlet form and through the press, has been estimated at already over 2,000,000 and that the good work is still going on.

It may also interest you to know, that I have had the compliment paid to me, that I have had some critics show willingness to discuss with me some of my statements. That gives a delightful sensation—opposition voluntarily and directly expressed, instead of a turning away in indifference or in loathing and disgust. I'm sorry for you that you have not had, as you inform me, such a sensation in connection with the Connolly articles. As I have explained, the reason is obvious. It may also interest you to know, that for every criticism I've heard, I have received from all parts of the United States strong expressions of approval from thousands of citizens of all classes. Some of them have printed and circulated, at their own expense, large editions of one or the other of these addresses. One Arizona enthusiast, with whom I have no personal acquaintance, who put out a large edition of the North Carolina address, reflects a sentiment which has come to me from many parts of the country, when he writes:

“A copy of this address should be in the hands of every voter in the United States who can read; and, if he cannot read, he ought to have it read to him.”

As you have been kind in giving me information, would you pardon me if I say that it would also interest me to know, why it is, that although the defendant in the "libel" suit to which you refer, filed an answer considerably over a year ago and therein stood upon the defense which is pleaded with all the particularity required under the New York practice—nevertheless neither the defendant in that suit nor Mr. Ewing nor their attorneys can get that case to trial?

The so-called courtesy of the press prevents the American people from reading what decent editorial staffs (and those who are not decent are the rare exceptions) think of Connolly and of your action in publishing his defamations. Taken as a whole, however, the American Press and the American people and particularly the American Bar, (which Mr. Connolly still further insults by his claim of membership), are in hearty sympathy with Mr. Ewing and are saying, as ever since he spoke to the Georgia Bar they have been saying, "Your protest is our protest; your sentiments ours."

If a court could take judicial notice of facts which have become matters of nation-wide common knowledge, this pretense of a libel suit would be disposed of by judgment for the defendant on inspection of the complaint. The order of the court would be something as follows:

"Complaint alleges: someone libeled Connolly. Insufficient because paradoxical. Judgment for defendant."

Really, Mr. White, I cannot be kind to you Connolly-like people. As much as I love Mr. Ewing, I am envious of him.

Thanking you for your letter, I remain,

Yours very truly,

RGB.Q.

(Signed) ROME G. BROWN.





# The Dilemma of the Judicial Recall Advocate

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## ADDRESS

Before the State Bar Association of Missouri

DELIVERED AT

ST. LOUIS, MISSOURI

September 23, 1914

BY

ROME G. BROWN

Minneapolis, Minn.



# THE DILEMMA OF THE JUDICIAL RECALL ADVOCATE

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ADDRESS BEFORE THE MISSOURI STATE BAR ASSOCIATION,  
DELIVERED AT ST. LOUIS, MISSOURI,  
OCTOBER 23, 1914

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By Rome G. Brown,  
Minneapolis, Minnesota

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*Gentlemen of the Missouri State Bar:*

I am bringing coal to New Castle when I present to you arguments against the judicial recall. The subversive measures of the recall of judges and of the recall of judicial decisions have never found favor among the enlightened membership of the Missouri Bar. Indeed, this Bar has been the source of one of the most convincing arguments against the judicial recall that has ever been uttered in this country. In his "Legal Antiquities," Mr. Edward J. White, your president, has demonstrated that the judicial recall is, in both its forms, a relic of barbarism. His book is one which should be read by every American citizen. Among its chief merits is the fact, that, although primarily a lawyers' book, it is written with a view to illuminating the citizen voter. It is clear, perspicuous and comparatively free from technicalities. No adequate conception of the real significance of the modern American agitation of the judicial recall can be acquired without consideration of the conclusive arguments made by Mr. White.

## PRESENT STATUS OF THE JUDICIAL RECALL AGITATION

The conditions affecting discussions of this question are quite different today from what they were two years ago.

Until recently the agitation in this country in favor of the judicial recall was by appeals to the prejudice of the uninformed citizen; while at the same time the arguments against it were confined mostly to discussions among lawyers themselves, who spoke in the language of lawyers and assumed on the part of their audiences a training in the science and history of government. These technical and legal protests reached few citizens beyond those who were members of the legal profession. At the same time, however, the forces of disruption, represented by the advocates of judicial recall, through subtle and insidious manner of statement, were fast gaining converts among the people through arguments which were in fact, although not then so generally recognized, the basis of a demand for a change in our form of government.

It is not for me to instruct the members of the American bar upon questions of constitutional government. It has been, however, my purpose, and is here today my purpose, to present certain phases of the judicial recall question in terms which may be readily understood by the average citizen voter. It is my object to urge every member of this bar to do likewise and to help bring to the electorate of this state and of the nation an appreciation of the true significance of the judicial recall, and the conviction, which you and I feel, that every movement in favor of judicial recall is retrogressive in its nature, that it is subversive—that, indeed, it is an instrument of socialism. The extent to which this phase of socialism has spread in the United States, before its baneful character could be appreciated by the people at large, is shown by the fact that already in five states the recall of judges has been incorporated into state constitutions. The early example of Oregon, in 1908, was followed during the past two years in Nevada, in Arizona, in California, and in Colorado. Indeed, Colorado made a still further retreat before the opponents of constitutional democracy, when it also wrote into its state constitution the recall of judicial decisions. In 1913, the state

legislatures of Kansas and Minnesota proposed constitutional amendments allowing the recall of judges, and these amendments will be passed upon at the general elections this fall. In these two states the judicial recall proposition was sugar-coated and fed to, and swallowed by, the legislatures of those states, without adequate consideration. This was done by providing that the election for a successor of a deposed judge should be separate from that of the election by which a judge was recalled; and it was claimed that this elimination of one of the incidental objections to the recall made the measure acceptable. Vigorous campaigns in both states are being made to defeat these amendments. They do not find favor among representative members of either of the two leading political parties. They were passed by legislatures during a sort of epidemic of so-called "progressiveism." They were incited by the then too prevalent belief that any radical change, if it only be branded as "progressive," was a step toward reform.

But this epidemic of radicalism is waning. There is now less tendency to confound change with progress. The pendulum of public opinion is returning to its normal range of swing, far within the extreme limits of revolution, on the one side, and of obstinate and unreasonable stand-patism, on the other. Today, a man is not so much considered an archaic reactionary just because he insists on stopping to deliberate, or even to debate, before accepting the proposition, for instance, that the constitutional safeguards to liberty and property may be disregarded by a court, if such court shall deem it for the public interest in any particular case. Today, a man is not so much a "plutocrat" if he insists that capital invested under constitutional protection shall not be deprived of adequate returns simply for the sake of increasing the public revenue. Today, there are fewer audiences in this country before which a man's opinion could be derided and scorned as that of a "conspirator" in favor of "allied in-

vested interests," solely for the reason that he advocates the preservation and maintenance of our constitutional form of democracy instead of its subversion, by striking at the independence of the judiciary, or by wresting from the judicial department of our government the power to exercise the essential and fundamental judicial function, the maintenance of which is the keystone of our form of government—the function of passing final judgment upon the constitutionality of statutory provisions.

#### THE JUDICIAL RECALL ON THE WANE

There are, throughout the nation, significant evidences of increasing enlightenment upon the question of judicial recall. While the average voter has as yet insufficient appreciation of its baneful character, nevertheless, there is a perceptible change in sentiment showing itself among the people of the different states. Former leading advocates of the judicial recall are saying less about it. Some of them are now saying nothing about it. Many have retreated to a position less repugnant to constitutional government. For instance, there had been most persistent advocacy of the judicial recall in Ohio. The president of the recent Ohio constitutional convention and many influential members of that convention, who are not learned in the law, were, and still are, advocates of the recall of judges and of judicial decisions. Yet that constitutional convention refused to refer to the electors of Ohio the proposition of judicial recall. Instead, that convention proposed a state constitutional amendment, which was adopted by the people, providing that no act of the legislature, duly approved by the executive and not vetoed by the people through the use of the referendum, shall be declared unconstitutional by the state supreme court, unless six of the seven judges concur. So in the constitutional amendment proposed for adoption at the general election this fall in Minnesota, increasing the number of supreme court judges from five

to seven, it is required that a concurrence of five out of seven judges shall be necessary in order for that court to declare a statute unconstitutional. Colorado participates in the same plan. This has become known as the "Ohio plan."

In Colorado, however, a further amendment forbids the judges of certain courts from declaring a statute or ordinance unconstitutional on the ground that it contravenes the Federal Constitution. The jurisdiction and function of a state court, so far as observing the requirements of the Federal Constitution is concerned, are, however, fixed by that instrument, which makes it the sworn duty of every judge, federal or state, to observe the provisions of that fundamental law as the supreme law of the land. This duty and function have been established, as an essential principle of our form of government, to include the power and obligation of every court, and of every judge of every court, to declare unconstitutional and unenforceable any statute, and any provision of any statute, which is repugnant to the prohibitions and limitations expressed in the Federal Constitution. Such duty and function, therefore, would seem to be not subject to abolishment or diminution by any legislative enactment or constitutional provision of a state. Accordingly, the Colorado extension of the Ohio plan is itself manifestly repugnant to the Federal Constitution, and, therefore, invalid. Depriving a mere majority of a state supreme court of the power to declare a statute invalid and unenforceable, is less objectionable. Substitutes, such as the Ohio plan, for the drastic and subversive judicial recall measures have the merit that they are, at least, less repugnant to our system of government.

Indeed, as, through the initiative and referendum, the powers of state legislation become more and more under the direct arbitrary action of the electorate, it is necessary, for the proper protection of personal liberty and property rights, that the safeguards of the Federal Constitution should, more than ever, come within the direct jurisdiction of the Federal



Supreme Court. Under the present Federal Judiciary Act that federal jurisdiction, as applied to the review of judgments of state courts upon the constitutionality of state statutes, is limited to a review of the judgments of state courts wherein statutes are held valid. The American bar has long advocated the extension of that federal jurisdiction also to decisions of state courts wherein a state statute is held invalid upon federal grounds; but it seems difficult, and perhaps impossible, to get such extension through the Federal Congress. At the present time a majority of a state supreme court may, generally, declare a state statute invalid. The more difficult it is made for a state supreme court to invalidate a state statute, the more is the opportunity increased to have the constitutionality of a state statute adjudicated by the Federal Supreme Court. Where now usually a majority of a state supreme court may invalidate a state statute upon federal grounds, the final judgment of the highest court of that state as to the constitutionality of such statute must, under the Ohio plan, be in favor of its validity unless more than a majority of the state court are against it. This would increase the number of cases where a writ of error would lie to the state court upon an adjudication of a constitutional question. I am not advocating the Ohio plan, but simply suggesting that, for existing insufficiencies which are recognized by the bar generally, it offers some elements of remedy, consistent with our form of government. In that respect it differs from the judicial recall, which is lacking in remedial character and is subversive of our form of government.

#### THE DILEMMA OF THE ADVOCATE OF JUDICIAL RECALL

An interesting and encouraging phase of the judicial recall controversy has emerged in the form of a dilemma with which the recall advocate is, under present conditions, squarely confronted. The wide-spread opposition arguments to the judicial recall have brought a wholesome enlightenment to think-

ing citizens. Its representative advocates have generally been superficial theorists, to whom an intelligent comprehension of our system of government is impossible. Some have been conscientious, but sadly lacking in those foundations of knowledge for which a proper grasp of the subject is necessary. Some have been reckless agitators, disciples of unrest, who, not from lack of intelligence, but from lack of proper regard for our free institutions, have been willing to exploit themselves as advocates of a drastic and suicidal specific for existing evils in the administration of government. The demagogue is always with us. Men, including some who were once sane leaders of thought and of action, have been willing to feed the fires of revolution, by catering, not to the intelligence, but to the lack of intelligence, of those who would pretend to believe that our government is an organized system of oppression. Then there is the socialist doctrinaire, whose propaganda of enmity to our constitution and the government established under it has been spread broadcast, through pamphlets, the socialist press and by the street-corner orator. The methods of the advocacy of judicial recall by all these agitators have been marked by a wholesale denunciation of the judiciary and of the judicial function under our system of government, the stability of which depends upon the maintenance of the integrity and independence of its judicial departments. This propaganda of disruption has also been furthered by the professional or chronic muckraker, appearing in the form of a contributor to or editor of some magazine of wide circulation, or in the form of some political or judicial pervert who allows himself to become the instrument of socialist teachings.

It was formerly sufficient that the judicial recall shouter should detail both real and imaginary evils in the administration of law as the source of all social injustice, and, without analysis and without disclosure of its real significance, should then urge as a panacea the assertion by the citizen-

ship of the nation of the right arbitrarily to recall a judge, or of the right, at a mass meeting of the voters or through a referendum ballot and in violence of the judicial function, directly and arbitrarily to adjudicate the constitutionality of a statute. Voters were thus at first misled by the impression, that, by the removal of limitations upon the arbitrary power of the electorate, we would have a government which was nearer to a pure democracy and that, in so far as our democracy limited the powers of the people, it was the means of oppression. Thus through hue and cry, the fallacies of the judicial recall gained a strong hold upon the minds of the voters in many states.

But, in the meantime, a campaign of education has been continued by the opponents of judicial recall. Through their efforts, people are recognizing more and more the fact, that rules of conduct are necessary in governmental affairs as well as rules of conduct in regard to ethical duties between man and man; that, for the protection of the individual and of minorities against the oppression of the whim and caprice of local and temporary majorities, it is necessary that the legislative power of the majority be limited; and that in no other way can the personal liberty and the rights of property and the pursuit of happiness be vouchsafed to the citizens of a constitutional democracy. The fact is further becoming recognized by the citizen voter that rules of conduct in governmental affairs are meaningless without some established power of their enforcement; and that such assurance can only rest in the maintenance of an independent judiciary, to whom shall belong the function of setting aside any arbitrary legislation of a majority which deprives the individual or the minority of the rights which are thus safeguarded. The attack upon the established judicial function, which is made by the judicial recall, has been discovered to the people as an attack upon their rights and liberties, because it is an attack upon the safeguards established for their protection.

Today the judicial recall advocate has to face the proposi-

tion, to which he is now forced by the increasing enlightenment of his audiences, that he must either recede from his advocacy of judicial recall, or must take the position of one who is avowedly an opponent of our present form of government. He is, therefore, relegated to the position of the socialist agitator, just as long as he persists in his advocacy of the judicial recall. Placed in that dilemma, many of its former advocates have shrunk before the alternative thus forced upon them and have given up the subversive proposition of the judicial recall and have become identified with measures less revolutionary. Some have become advocates of the "Ohio plan," requiring more than a majority decision of a court to declare a statute unconstitutional.

One of the salutary effects of this agitation has been to strengthen the cause for which the American bar has been for years working,—the cause of remedial reforms in the administration of justice. That cause has advanced in the past few years with rapid strides, as shown by the adoption of various statutes and rules of procedure eliminative of former obstacles to the efficient enforcement of the law. Organized efforts for further reforms, which promise effective results, are shown by the investigations and the reports which are now in progress on the part of the National and State Bar Associations and on the part of associations not controlled by lawyers. The National Economic League, through its committee of two hundred selected from all parts of the country and composed of the most distinguished lawyers and laymen, has, through its preliminary report just published, outlined a systematic movement for thorough reforms corrective of present evils and promotive of the best efficiency in the administration of justice.

#### A QUESTION OF SOCIALISM—NOT OF POLITICS

The most healthful sign of the times is that, in view of the dilemma thus now confronting the judicial recall advocate, the

agitation of judicial recall is becoming less a matter of party politics. The two great parties, of the republicans and of the democrats, are already on record, through their platforms and the expressed views of their representative leaders, as repudiating judicial recall. The third-term party two years ago deemed it consistent with its arrogated monopoly of all progressive ideas, to ally itself with the advocates of the recall of judges and of judicial decisions. The socialist-labor party, which was the first party to install a judicial recall plank in its platform, still adheres to its support of the judicial recall as an instrument of socialism. The last-named party will probably continue the only party which has, as a part of its fundamental political creed, a doctrine subversive of the judicial function and of our government. In that position it is consistent, because the avowed object of that party is to overturn our Constitution and our form of government and to destroy rights of property and of personal liberty, of which our present system of government is protective.

It is true that the third-term party candidate for governor in Pennsylvania is a noted apologist for the judicial recall. It is also true that that ex-president, who is a domineering—even if not now a dominant—factor in third-term party politics, has been a conspicuous advocate of the recall of judicial decisions. This ex-president, however, has evidently been made to feel the unwisdom of his ways in this regard; for of late he has been most eloquently silent on this subject of the judicial recall. The third-term party in New York has abandoned not only the recall of judges and of judicial decisions, but also the initiative and the referendum. Their state platform carefully avoided the judicial recall planks which were a part of their last national platform. In the present political campaign in Michigan, the republican nomination for governor has been captured by Mr. Osborn despite the fact that he is obsessed with the judicial recall fallacies. Representative republicans in that state, however, have called

upon him openly to repudiate the judicial recall, under the penalty, if he refuses, that they will withhold their support and, independent of politics, join with the democrats in the election of a candidate whose views on the judicial recall are not both anti-democratic and anti-republican. Leading papers in the state of Michigan are urging a repudiation of the judicial recall in state and county conventions. The *Detroit Free-Press*, an influential and independent newspaper, is urging to the voters of Michigan, that, regardless of partisan politics, they refuse to support any candidate or any party which, by acceptance of the judicial recall, becomes an ally of socialism. In advance of the republican state convention in Michigan, county conventions are adopting resolutions condemning judicial recall. In Minnesota, where the people this fall vote upon a constitutional amendment authorizing judicial recall, the republican candidate for governor has been called upon to announce himself in opposition to the proposed amendment. The rank and file, as well as most of the representative leaders of both the republican and democratic parties, demand that the judicial recall measures be repudiated. Those third-term party leaders who show signs of recovering their sanity are tending in the same direction.

#### THE SOCIALIST THE ONLY CONSISTENT ADVOCATE OF JUDICIAL RECALL

The advocate of judicial recall is an ally of socialism. The fact is obvious that, today, the judicial recall advocate is generally regarded as a vagarist. And so he is, except from the view-point of one who either is a socialist or is tainted with socialism. So long as he persists in adherence to this heresy, which is repugnant to constitutional government, he is today forced to preach the doctrines of socialism as the only consistent basis for his fallacies. The most logical opponent of our Constitution is the Socialist. He is the foremost of its antagonists, the first in priority of time, the most active and

the most persistent. The Socialist, however, frankly admits that it is a part of his social and political creed to destroy our Constitution and our government, and to do away with rights of private property, and, indeed, with all rights so far as safeguarded by constitutional provision. He frankly avows that among the barriers between socialism, on the one hand, and an orderly government with constitutional safeguards, upon the other, the first that must be broken down is the present established authority of the judiciary to render unenforceable any statute which contravenes the express protections of the Constitution. He would wipe out these barriers, if possible, by repeal of the Constitution itself; and, until such repeal shall be accomplished, he would destroy constitutional protection by eliminating all power of its enforcement.

It is a part of the socialist creed that vested property rights in this country have, by subtle and insidious processes, been stolen or usurped from the people as a whole. It is further a part of that creed that the judicial function under our constitutional government of adjudicating the constitutionality of a statute, was also, by devious methods, stolen or usurped by the courts themselves, and that this was done for the benefit of, and through the procurement of, conspirators representing the interests of property holders and in violence of the social and political dogmas of socialism which defy all restraint, and which, therefore, defy all protection by the government of property and personal rights. This right of private property, and this power of its safeguarding through the exercise of the judicial function are, therefore, to the socialists, both a right and a power which neither any citizen nor the citizenship of the nation or of any state is under any obligation to respect. They would eliminate both by indirect methods if possible; but, if necessary, they would destroy both by any direct methods efficient for that purpose.

It is significant that the instrument which the socialists would use for this revolutionary change is the judicial recall.



The modern advocacy of the judicial recall measures sprang from socialism. The present socialist-labor party was the first political party in America to demand the recall. The judicial recall measures are essentially mere instruments of socialism. As stated by the leading organ of the socialists, —*The Appeal to [T]Reason*,—speaking of the judicial recall:

“It is the means whereby the people will be enabled to inaugurate Socialism, and after that is done they may secure democracy in industry.”

So the socialists inveigh against the Constitution and against the judiciary. It is the platform of the National Socialist Party which, after the recall plank, urges the abolition of the power of the courts to declare statutes unconstitutional and claims that this power has been usurped by the courts. The same platform further declares that these measures—that is the recall measures and the abolition of the functions of the courts—

“are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance.”

Keep these facts in mind when you are told by others, who know or ought to know better, that the powers exercised by our courts have been “arrogated” to or “usurped” by the courts themselves; and when you are urged to wrest from the courts their chief functions and to turn over to the people the direct control of judges or the direct adjudication of constitutional questions.

#### THE SOCIALIST VIEW OF THE FEDERAL CONSTITUTION

The socialist view of our federal constitution may be assumed to be authentically presented by a recognized socialist who contributes to a certain American monthly magazine, which, before its period of decadence, had some elements of respectability. Some of you may remember, even in these



days of its obscurity, a monthly periodical known as *Pearson's Magazine*. Within the past three years this magazine has been exploiting in its columns such unwarranted and dastardly attacks upon our Federal Constitution that it has thereby sufficiently demonstrated its right to the boast flaunted upon its cover page,—that it prints stuff “that others dare not print.” Even in this day of sensation-mongers it is probably true that no other publication would have had the effrontery to violate truth, to shock all sense of decency, to the extent that this magazine has done. It ridicules the term “patriot fathers” as applied to the framers of our Constitution. It brands them as “grafters” who initiated and carried through a change in our system of government and framed and established a constitution, upon a plan which “was never meant to bring about rule by the people,” but which was adroitly put together and the adoption of which was surreptitiously and deceitfully procured,—all for the sole purpose “to enhance the value of their own property holdings and to tighten and increase the burden of the shackles which theretofore existed upon the liberty of the common people.” The Constitution of the United States, it says, was made for the people “in the same sense that sheep-shears are made for sheep. The gentlemen who made the Constitution had sheep to shear.” This is the view presented by a 1913 American journal, and in support of its propositions it indulges in a mess of misinformation and of garbled and distorted citations from authorities.

To such an extent has this periodical joined the forces of the socialist propaganda that the reprints of its articles, reviling the Federal Constitution and its makers and expounders, have become religious tracts and text-books of enormous circulation in socialist circles. The unfortunate feature of this socialist propaganda is, that these vitriolic pamphlets, copyrighted, sold and distributed by the publishers of *Pearson's Magazine*, have had, and are still having, a poisonous effect upon the minds of many editors, magazine writers, newspaper

men, and citizens generally, who are misled by these instruments of error.

#### THE CLIMAX OF SOCIALIST DEFAMATION

Not content with reviling the Constitution and its makers, the socialist goes to the extreme of defaming the signers of the Declaration of Independence and the instrument itself which declared the separation of this nation from the tyranny of monarchy. In a "patriotic edition" of the socialist organ, *Age of Reason*, published at Dallas, Texas—its last July number—it is declared that the patriots of the Revolution, when they returned home from their battles,

"found that the thieves of America had written this document to fool the workers with. . . . They were then compelled to go to this robber-creditor class (who had written the beautiful document above referred to) for supplies to make a crop. These liberty-loving thieves were also the law-makers—the makers of the laws they had passed to imprison men for debt. . . . Could the demons of hell hatch a more damnable plot against the working-class? . . . Just a few men have the right to make the laws, hence they make the laws so that just a few men can own the property. . . . They framed this document so that it would arouse the ire of the working-class and cause them to rise up and drive the British out of this country, and give to this bunch of American capitalists the right to make the laws so that they could take the place of the English capitalists and rob the working-class."—And more of the same twaddle, *ad nauseam*.

#### ALLIES OF SOCIALISM

It would be useless to detail these shocking affronts to the sense of decency of enlightened citizens, except to bring home to our minds the malignant forces of disruption with which many persons, who would repudiate socialism as such, have, in fact, become allies. For the Socialist is to be commended in his attacks upon the Constitution as compared with the

less frank, the subtle and insidious attacks indulged in by those who either know, or ought to know, better.

Aristotle defined a demagogue as one who catered to the prejudices of the people by attacking existing institutions, and particularly the judges and other magistrates, and urging more power for the people to be expressed by popular majorities, although leading to a non-constitutional democracy of a sort which is analogous to a tyranny.

Aristotle's definition applies today to many conspicuous advocates of the judicial recall, some of whom I shall mention.

Ex-President Roosevelt has demonstrated that he is afflicted with what physicians or alienists would term an incurable "idiosyncrasy" for all legal and constitutional questions. He has just been telling the citizens of the South American Republics, whose governments are modeled upon our own, that our constitutional system of government is wrong and that the prime function of our courts is performed only through usurpation of judicial power. In his speech the other day at Buenos Ayres he aligned himself with the socialists who advocate the destroying of constitutional safeguards and then the wresting from owners of holdings of private property.

Roosevelt allied himself with the socialists, advancing the doctrine which is a creed of socialism, when he said, at Buenos Ayres, that the power at present exercised by our courts to preserve and enforce constitutional safeguards is a power "arrogated" to and "usurped" by the courts themselves. He further allied himself with the socialist method of muckraking our Constitution and our judicial system when he stated, at the same time, that for more than thirty years the courts of this country have exercised their powers with "inexcusable and reckless wantonness on behalf of privilege," and against the interests of the people. This statement is no mere lapse from overenthusiasm, for he assures us that he makes it "gravely and deliberately." We have in him, then, an ex-

President preaching socialism. For this attack upon our judiciary is precisely the same as that which has been continuously for years (and also, in the words of Roosevelt, “gravely and deliberately”) made by the socialists as the basis for their doctrine that the Constitution with all its safeguards should be wiped out. Moreover, the instruments of destruction which they advocate as the most efficient to accomplish this end are precisely the same judicial recall measures that are urged by Roosevelt.

Roosevelt refers to the decision recall as a newly discovered remedy,—as “My Remedy,”—although it was thoroughly discussed and unanimously repudiated in the Australian Constitutional Convention ten years before, evidently, he ever heard of it. It was rejected as manifestly inconsistent with and repugnant to a constitutional form of government; and this, too, at the same time that the enlightened and progressive people of that entire continent adopted a constitution modeled in all its essential features upon that of this country.

#### “EVERYBODY’S” SHOULD BE NOBODY’S

Another unscrupulous and despicable contributor presented some time ago in another magazine (*Everybody’s*,—it should be nobody’s) a venomous attack upon the judiciary, in which he traduced individual judges, maligned the courts, and calumniated the entire judicial department by false statements, by subtle innuendos, which undoubtedly brought conviction to the general mass of unthinking readers, but which to discriminating persons brought only the reaction of an intense shock to their sense of decency. The Tennessee Bar may be proud of the manner in which one of its members paid his respects to this “Connolly person” journalist; and if any of you should wish to read in print the sentiments of protest which you felt at the time, I would refer you to Mr. Caruthers Ewing’s speech two years ago before the Georgia State Bar Association.

## THE JUDICIAL PERVERT

Such are the various and eccentric moods of the human mind that it is not astonishing that, now and then, even a member of the American bench should be found so to partake of the characteristics of the pervert as to allow himself to become allied with those whose creed is based upon a derision and revilement of our Constitution, of our constitutional democracy and of the administration of our government. No socialist has gone to a further extreme of malignant vituperation in discussing our federal constitution and its makers and expounders than has a certain Chief Justice of the Supreme Court of one of the oldest states of the Union. Let me say here, for the North Carolina Bar and for the citizens of that state, that when recently I denounced the views of this judge and their utterance from such a source (which it was my pleasure and privilege to do in the presence of this Chief Justice and before the bar of his state) the fact was demonstrated to me that his assaults upon our Constitution and upon the judiciary of the nation and his advocacy of judicial recall, have been and are offensive to the press, to the bench, to the bar and to citizens of that great state. I doubt that one per cent of the bench and bar, or of the citizens, of North Carolina have any sympathy with the apostate attitude assumed by this Chief Justice upon these questions.

Chief Justice Walter Clark of the Supreme Court of North Carolina, in his address at Cooper Union, New York, last January, chooses to view the issues of reform, social, economic and constitutional, which have been and still are pressing, as merely issues between an unrighteous controlling class, upon the one side, and an oppressed class, upon the other. The past and present issues of judicial reform, of the framing, construction and enforcement of our Constitution itself,—all these issues have been and still are simply the struggle between the “exploiters,” upon the one hand, and of the “exploited,” upon the other hand.

The Constitutional Convention at Philadelphia, in 1787, assembled, he says, only "for the nominal purpose" of creating better business and commercial relations between the states and to supply the need of a stronger Union. In default of the trust imposed upon them, and using the pressing necessities only as a pretext for their selfish ends, the framers of our Constitution shaped that instrument, "with sublime audacity," as he says, with the very intention and with the very result that the "reactionary" "exploiters" of an oppressed people then took and have since maintained control of our government. As "the allied vested interests" then intentionally made the Federal Constitution an instrument of oppression and injustice, so they next, by various means, persuaded the different states to its adoption. The same "vested interests" afterwards procured to be stolen or "usurped" from the people, the power, never intended for the courts, of the Judiciary to declare invalid and unenforceable statutes repugnant to the express prohibitions of the Constitution. This was a further grasp of power by the designing "exploiters" in control. More than that, the courts of the land, he asserts, have become, by usurpation, the arbitrary, capricious and oppressive rulers of the people. The XIV Amendment "means anything and everything that the judges see fit." The decisions of the Federal Supreme Court have been subtle perversions of the law and the reasonings of those decisions are mere instances of "sardonic irony" and of "adding insult to injury."

This Chief Justice re-echoes the socialist cry when he says, referring to the discontent prevailing among certain classes of citizens:

"The progressive and humanitarian measures necessary to the betterment of their condition are almost invariably negatived by the courts, whose sympathies are with the propertied class and vested rights."

To overturn this "Government by Judges,"—a government which is "very largely a plutocracy," he would deprive the judiciary of its power of final determination of constitutional questions and would leave the adjudication of such questions to a referendum ballot through the recall of judicial decisions or would deprive the courts entirely of their power of declaring any statute unconstitutional. He would, therefore, replace our system of judicial functions with that which is in vogue in England; although, as is well known, English statesmen have deplored the deficiencies of their system and praised the American judicial function as a scientific model for all the world.

Our confidence in the correctness of the observations of this jurist is not increased by the fact that he tells the people of New York that it was judicial usurpation when the United States Supreme Court overruled "your State Statute," in the *Lochner* case and that, in the same decision, Justice Holmes makes a certain statement in regard to the police power; for the statement quoted from Justice Holmes was not made in the *Lochner* case, but appears, in connection with an entirely different state of facts, in the later case of the *Noble State Bank vs. Haskell*.

Before you, before any citizen of well-balanced intellect, not tainted with the enticing but fallacious dogmas of socialism, who has studied the subject impartially, it is unnecessary to offer an answer to the jibes and epithets with which Chief Justice Clark characterizes our Constitution, its makers and its expounders. A lawyer of the American Bar naturally resents such derision of our institutions, especially when uttered in such a spirit from such a source.

But consider the effect of such utterances, especially from such origin, upon masses of the people, untaught in the science of government, many of whom are already incited to restlessness and even to open defiance of authority. Why thus wantonly and recklessly furnish encouragement, aid and ammu-



dition to the forces of disruption? Why thus excite further the already too prevalent spirit of antagonism to our free institutions? Why thus feed the fires of unrest, of discontent and even of rebellion, which are even now threatening devastation.

The primary purpose of public discourse touching the relations between the government and the individual should be to inculcate methods of calm, deliberate, impartial study and consideration on the part of the citizen, and to help to bring to him an enlightened appreciation of the necessity and wisdom of established rules of conduct in governmental law, as well as in respect of social relations; to teach the citizen that his selfish whim, caprice, prejudice or interest must yield, to some extent at least, to the general interests of the community; that the general public interests cannot be safeguarded without lawful submission to the authoritative enforcement of the protective provisions of the fundamental law, which are such rules of conduct established for the good of the nation; and that that government is ultimately the most wise and beneficent, as well as the most stable, which is founded upon enforceable rules of conduct protective of the individual and of the minority, as well as of the majority. The object should be to promote better citizenship.

If the holding up, before the people of our nation, of our Constitution and our American form of government to the derision and contempt of its citizens is promotive of better citizenship, then "better citizenship" means the citizenship of socialism; it means the rule of the dynamiter. Justice Clark's address would make an orthodox chapter in the creed of the socialists, or a consistent editorial in their organ, the *Appeal to Reason*, or in the anarchist organ, *Mother Earth*. You will note that Chief Justice Clark shows more familiarity and more sympathy with the propaganda of socialism than he does with the Federal Constitution or with the decisions of the Federal Supreme Court.



And yet this muckraker of our Constitution and courts has had the audacity recently to aspire to appointment as justice of the United States Supreme Court! If thus holding in contempt the institutions of this country, he were a foreigner and as such should come before one of you, sitting as a judge to pass upon his application for naturalization, what, do you think, knowing his views, would be your judgment as to his qualifications to take the oath of allegiance and citizenship?

#### THE JUDICIAL RECALL NOT REMEDIAL BUT SUBVERSIVE

The recall of judges has the effect to subject judges to the constant menace of the arbitrary will of the voters of the judicial district in which they preside. It leaves to a mass meeting of voters, controlled by a majority of those who happen to be present, the arbitrary power to unseat a judge. The exercise of the recall in Oregon has shown that, despite the pretention to the allowance of a defense and hearing, the decision of the voters is controlled by hue and cry and that the system is merely a return to the ostracism of ancient democratic tyrannies. Its effect is only to lessen, to the point of destruction, whatever of independence is left to the judge by the judicial elective system. It invites, even compels, a judge to keep his ear to the ground and to anticipate the changing whims of popular passion. He is made a servant, not of the law, but a mere spokesman of the caprice of majorities. The system, therefore, is one which tends to eliminate the protective force of constitutional safeguards.

The judicial decision recall is more directly subversive of our system of government. Its effect is to vest in the makers of a statute the power to dictate as to its enforcement, irrespective of the question whether or not it deprives any citizen or any set of citizens of their liberty or property without due process of law. Indeed, the enforcement of such a statute, under the decision recall, is not left to its legislative authors, who may be supposed to have given to it some method of de-

liberation; its enforcement is left to a mass meeting of the electors of such legislature.

#### THE COLORADO EXAMPLE

The best illustration of the real significance of the decision recall is the Colorado example.

Under the recent Colorado amendment a supreme court decision declaring unconstitutional any state statute may be made ineffective by a majority of the votes cast by state electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the judicial decision recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide whether in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day, and another way another day, with reference to the same provision. One city might decide one way and at the same time another city another way, with reference to the same provision.

Now, what do you think of the wisdom or sanity of those pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive"

methods, as merely “a new method of constitutional amendment by popular vote?”

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a *reductio ad absurdum* of the decision recall argument.

#### THE FALLACY OF JUDICIAL USURPATION

The most common fallacy leading to the greater fallacy of the judicial recall, is that arising from the too prevalent misrepresentation and the resulting misunderstanding with reference to the nature of the judicial function under our system of government. This fallacy is embodied in the socialist doctrine that the judiciary has “usurped” the function to pass final judgment upon the question as to whether a statute is repugnant to the Federal Constitution. This fallacy is the product of socialism, with which certain present-day agitators have become infected to the extent that they, too, proclaim that this function of the courts has been “grasped” by the courts themselves. Some refer to it as a “veto” by the judicial department upon the acts of the legislature. Others refer to it as an arrogated power of “judicial nullification,” unwarranted under a proper view of judicial functions. They would deprive the courts of that function which is essentially the function of the courts—the function of weighing the facts and the law as applied in a particular case to a particular statute and afterwards of expressing in a final decree their deliberate and well-considered judgment upon the question of constitutionality. They would substitute, in the place of the careful *judgment* of a tribunal of triers experienced in the trial of facts and learned in the law, the arbitrary and capricious *pre-judgment* of comparatively incapable arbiters declared at a mass meeting or at a referendum election.

As this claim of usurpation is the foundation of the hue

and cry made by the socialists and their allies, and is such a common basis for the judicial recall arguments, let us here note briefly some reasons why it is unfounded. The same Chief Justice, heretofore referred to, has publicly stated with reference to this judicial function:

“The possibilities of the court were not understood, and indeed were unknown until the vast extension of power was grasped, without any grant in the Constitution itself, by an *obiter dictum* opinion in *Marbury v. Madison*, . . . The importance, indeed the overwhelming preponderance of the Judiciary in the Government was unexpectedly created in 1803 by a decision of the Supreme Court of the United States, without a line in the Constitution to authorize it, when that body assumed the right to nullify and veto any act of Congress that they chose to hold unconstitutional. This astonishing declaration was made in the case known as *Marbury v. Madison*, by Chief Justice Marshall. The doctrine was shrewdly set forth in an *obiter dictum*, . . . promptly seized upon as a boon by the Special Interests and by all who at heart believed in the Government of the many for the benefit of the few.”

Let us pass the imputations as to the motives of Chief Justice Marshall and review a few facts, the accuracy of which is demonstrated by printed records and statutes. We may draw for our matter upon authentic records of events and upon Federal Statutes ante-dating the “surprise” of 1803; instead of misquoting the decisions of the Federal Supreme Court or branding them as “shrewdly” perverse to the law, and also instead of adopting *obiter dicta* from socialist text-books.

That our fundamental law makes the enforcement of constitutional safeguards the primary function of the Judiciary, Federal and State, was demonstrated by Chief Justice Marshall in the famous case of *Marbury v. Madison*, 1 Cranch, 137, in which, Chancellor Kent declares,

“the power and duty of the Judiciary to disregard an unconstitutional act of Congress or of any state legisla-

ture, were declared in an argument approaching to the precision and certainty of a mathematical demonstration.”

The limitations of the Constitution were expressly made the supreme law of the land, binding upon all courts, Federal and State, and with the duty, under oath, of every judge of every court to observe them as the paramount law of the land, Chief Justice Marshall demonstrated that, not only by express provision, but also by necessity, it was the duty of the courts to declare unenforceable a statute which contravened the Constitution. He said:

“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . A legislative act contrary to the Constitution is not law.”

It is urged by the socialists and by their coadjutors, the advocates of the judicial recall, that this decision by Chief Justice Marshall was a usurpation by, or arrogation to, the courts of a power not expressed and never intended to be enforced as a constitutional judicial function. No better answer to this claim can be made than the convincing arguments of Marshall in the case of *Marbury v. Madison*. But that this was the interpretation of the Constitution, upon the faith of which, more than any other single feature, the original states were persuaded to accept it, is shown by the various arguments of Ellsworth, Hamilton and others prior to its adoption. Hamilton urged in the *Federalist*:

“There is no liberty where the power of judging be not separate from the legislative and executive power. . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution, . . . Limitations of this kind can be preserved in practise no other way than through the medium of courts of justice, whose

duty it must be to declare all acts contrary to the commands of the Constitution void.”

Upon the same ground Ellsworth, on January 7, 1788, urged the ratification of the Constitution upon the Connecticut convention, when he said:

“If the general legislature should at any time overlap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, or if they make a law which is a usurpation upon the Federal Government, the law is void; and upright independent judges will declare it so.”

This doctrine of the judicial function had been prevalent in the states of the federation, prior to the adoption of the Federal Constitution, and had been recognized in the state of North Carolina where, in the case of *Bayard v. Singleton*, Martin's Reports, page 42, it was advanced by Mr. Iredell, who was subsequently an Associate Justice of the Federal Supreme Court. Indeed, fourteen years before the decision of Chief Justice Marshall in the case of *Marbury v. Madison*, and immediately upon the adoption of the Federal Constitution, the Federal Judiciary Act was passed by the First Congress under the Constitution, expressly providing, as it has ever since provided, for the review in the Supreme Court of the United States of the judgments of inferior Federal courts, *as well as for the review of cases where the validity of state statutes or any exercise of state authority should be drawn in question, on the ground of repugnance to the Constitution, treaties or laws of the United States, and the decision should be in favor of their validity.*

Now how can any man, who is informed of the facts and who at the same time is sane and conscientious, for a moment

say that the judicial function of declaring statutes unenforceable which are repugnant to constitutional prohibitions was usurped or “created” through the decision of Chief Justice Marshall in 1803, and that theretofore it never existed in fact and was never before recognized and was never before intended to be recognized in our American jurisprudence? Why, not only had it been so understood by the states in their adoption of the constitution, but almost the first act of the American Congress under that Constitution, and fourteen years before Chief Justice Marshall’s decision, was to write that particular judicial function into the statutes of the United States and in the very form and wording in which it has ever since been expressed.

This Act was drawn by Oliver Ellsworth, the third Chief Justice of the United States, and himself a member of the Federal Convention. Thus the First Congress confirmed that theory of the Constitution, on the faith of which its adoption by the states was procured, and which was further confirmed and demonstrated by Chief Justice Marshall, in the first case in which it was passed upon by the Federal Supreme Court,—that the question of the repugnance of a statute to constitutional prohibition is a *judicial question*, the determination of which belongs, under the Constitution, to the courts; and that the final determination of the repugnance of a statute, Federal or State, to the Federal Constitution belongs to the United States Supreme Court.

This charge of “usurpation” is a mere pretext for striking at the very keystone of our system of government.

#### OUR CONSTITUTION A SCIENTIFIC MODEL

It is not my purpose here to attempt a defense of our constitutional system of government. In contrast, however, with the methods of attack which I have outlined, let me here briefly note that the American Constitution, with its established functions of the judicial department, is in fact, and has become



recognized as such throughout the world, the foremost scientific model of fundamental law.

The history of the advance of civilization has been the history of the emergence of the judicial conscience from the malignant influence of oppressive interference. As shown by Mr. Edward J. White, in his book to which I have referred, the Babylonians, more than two thousand years before the Christian Era, had the recall of judges and the recall of decisions by the exercise of the tyranny of monarchy. Under the pure democracy of ancient Greece, through the system of ostracism, was exercised the judicial recall in both its forms. So, under the unlimited democracy of the Roman Republic, the referendum ballot was used to inflict banishment or death upon the judges or to overrule their decisions.

The transition from comparative barbarism in governmental affairs, from the tyrannies of monarchy and of democracy which brought disgrace and disaster to the governments of old, to an enlightened recognition by all classes of the necessity of a re-establishment of the judicial function, began when the English people wrested our Bill of Rights from King John at Runnymede. But that was only the first step; for it took centuries to bring home to the advancing English civilization the fact that Bills of Rights, no matter how assertive of the inalienable rights of the individual against the injustice and oppressions of the tyranny of arbitrary control, were futile to effect protection without the independence of that department by the proper exercise of whose functions they might be enforced. Such power of enforcement was lacking until the beginning of the 18th century; because, prior to that time, the English sovereign reserved and exercised the power of arbitrary recall of any judge, and judicial judgments were subject to the election of the sovereign. The statute of William III., however, enacted nearly a century before the adoption of our Federal Constitution, established in English jurisprudence the principle that the members of the judiciary,



during the term of office for which they were selected, should be independent judges of the law and not the servile tools of either a monarchical or popular sovereignty; that their judgments when rendered should be enforced as the law, at least as the law of the case; and that their recall or that of their judgments should not be accomplished by hue and cry spread among the people to influence the results of a referendum election, the possibility of which, if recognized by law, always stands as a menace to the justness and independence of the judge and of his judgments.

It took centuries even to begin this revolt from barbarism. It took still further centuries to establish the principle of an independent judiciary as a requisite to the most enlightened system of jurisprudence ever known in the history and science of government. In the two centuries following, it was by the enforcement of this principle that meaning and efficacy were given to the fundamental doctrine of individual liberty embodied in the same Bill of Rights which is written into our own Federal Constitution, and made, by the same instrument, the supreme law of the land controlling upon all judges, state and federal; and which has become also a part of every state constitution since formulated.

It was under this establishment of effective protection, not merely theoretical protection, of the individual and of the minority against the arbitrary caprice and oppression of local or temporary majorities, that has made stability, efficiency, security of life, liberty and property of persons and of minorities, prosperity and enlightenment of its citizens, the characteristic features of the government of this, the greatest republic in the world's history. It is these scientific, practical and effective features of our system of government which have made it the model for all modern governmental reorganizations and have made our Constitution and the government administered under it the objects of admiration and even marvel of the masters of the science of government.

Gladstone characterized our Constitution as expounded by Marshall, "the most wonderful work ever struck off at a given time by the brain and purpose of man." Bryce, the greatest modern student and authority upon constitutional government, terms ours, as "the first true federal state founded on a complete and scientific basis."

Lord Brougham, referring to our Constitution, said:

"The power of the Judiciary to prevent either the state legislature or Congress from overstepping the limits of the Constitution is the very greatest refinement in social quality to which any set of circumstances has ever given rise, or to which any age has ever given birth."

The English historian, John Morley, referring to the opinion of the world's students of government and their attitude towards our Constitution, said:

"Everybody praises the American Constitution these days."

Lord Salisbury said, in 1882:

"I confess I do not often envy the United States, but there is one feature in their institutions which appears to me the subject of the greatest envy—their magnificent institution of a Supreme Court. In the United States, if Parliament passes any measure inconsistent with the Constitution of the country, there exists a court which will negative it at once, and that gives a stability to the institutions of the country which, under the system of vague and mysterious promises here, we look for in vain."

If Lord Salisbury says this of the English system, what reply would he make to one who holds up to you as models, above our own, the judicial systems, not only of England, but of France and Germany? The French and German are systems still more "of vague and mysterious promises," for the very reason that they are based to a still greater extent

upon a disregard for precedents. A government of law cannot exist where the only basis for arriving at the conclusions of fact and of law in a litigated case or in a criminal prosecution is the mere passing impulse of the triers with reference to what they may deem to be the merits. One might as well commend to us the system of Mexico. There is a government, the administration of which is not hampered by any regard for precedents, nor by any regard for a constitution, much less by any regard for constitutional limitations. There is a government administered without the intervention of any judicial functions, usurped or otherwise. In Mexico they are not bothered with precedents, nor even with any system of promises of protection to life, liberty and property, either expressly written or vague and mysterious. The condition of Mexico is the logical result of the elimination of constitutional protection and of the debasement of the judicial function. To such a goal would the revilers of our American Constitution and judiciary turn the people of this Nation. Justice, equality and consistency in the administration of law, protection for the established rights of life, liberty and property require that all magistrates should act with a proper regard for precedents.

Shall we replace our present constitutional democracy with a democracy which has no enforceable Bill of Rights; which has no stable, sure, consistent or equally administered constitutional protection for the individual as to his life, liberty or property? Shall we destroy that stability of our institutions which, as Lord Salisbury said, is protected by the exercise of judicial functions as they are established under our Constitution? Shall we, by making the will of the legislature enforceable upon the demand of a popular majority, destroy constitutional protection and make our system of government also a mere "system of vague and mysterious promises"?

All this we do as soon as we consent to subject judges or judicial judgments to a referendum election.





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# JUDICIAL RECALL

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## ADDRESS

DELIVERED AT ST. LOUIS, MO., ON SEPTEMBER 23, 1914,  
BEFORE THE STATE BAR ASSOCIATION  
OF MISSOURI

ON "THE DILEMMA OF THE JUDICIAL RECALL".

BY

ROME G. BROWN

CHAIRMAN OF THE AMERICAN BAR ASSOCIATION  
COMMITTEE TO OPPOSE JUDICIAL RECALL



PRESENTED BY MR. McCUMBER  
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## THE DILEMMA OF THE JUDICIAL-RECALL ADVOCATE.

[Address before the Missouri State Bar Association, delivered at St. Louis, Mo., September 23, 1914. By ROME G. BROWN, Minneapolis, Minn.]

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GENTLEMEN OF THE MISSOURI STATE BAR: I am bringing coal to New Castle when I present to you arguments against the judicial recall. The subversive measures of the recall of judges and of the recall of judicial decisions have never found favor among the enlightened membership of the Missouri bar. Indeed, this bar has been the source of one of the most convincing arguments against the judicial recall that has ever been uttered in this country. In his "Legal Antiquities," Mr. Edward J. White, your president, has demonstrated that the judicial recall is in both its forms a relic of barbarism. His book is one which should be read by every American citizen. Among its chief merits is the fact that although primarily a lawyer's book it is written with a view to illuminating the citizen voter. It is clear, perspicuous, and comparatively free from technicalities. No adequate conception of the real significance of the modern American agitation of the judicial recall can be acquired without consideration of the conclusive arguments made by Mr. White.

### PRESENT STATUS OF THE JUDICIAL-RECALL AGITATION.

The conditions affecting discussions of this question are quite different to-day from what they were two years ago. Until recently the agitation in this country in favor of the judicial recall was by appeals to the prejudice of the uninformed citizen; while at the same time the arguments against it were confined mostly to discussions among lawyers themselves, who spoke in the language of lawyers and assumed on the part of their audiences a training in the science and history of government. These technical and legal protests reached few citizens beyond those who were members of the legal profession. At the same time, however, the forces of disruption, represented by the advocates of judicial recall, through subtle and insidious manner of statement were fast gaining converts among the people through arguments which were in fact, although not then so generally recognized, the basis of a demand for a change in our form of government.

It is not for me to instruct the members of the American bar upon questions of constitutional government. It has been, however, my purpose, and is here to-day my purpose, to present certain phases of the judicial-recall question in terms which may be readily understood by the average citizen voter. It is my object to urge every member of this bar to do likewise, and to help bring to the electo-



rate of this State and of the Nation an appreciation of the true significance of the judicial recall, and the conviction which you and I feel that every movement in favor of judicial recall is retrogressive in its nature; that it is subversive; that, indeed, it is an instrument of socialism. The extent to which this phase of socialism has spread in the United States before its baneful character could be appreciated by the people at large is shown by the fact that already in five States the recall of judges has been incorporated into State constitutions. The early example of Oregon in 1908 was followed during the past two years in Nevada, in Arizona, in California, and in Colorado. Indeed, Colorado made a still further retreat before the opponents of constitutional democracy when it also wrote into its State constitution the recall of judicial decisions. In 1913 the State legislatures of Kansas and Minnesota proposed constitutional amendments allowing the recall of judges, and these amendments will be passed upon at the general elections this fall. In these two States the judicial-recall proposition was sugar-coated and fed to and swallowed by the legislatures of those States without adequate consideration. This was done by providing that the election for a successor of a deposed judge should be separate from that of the election by which a judge was recalled, and it was claimed that this elimination of one of the incidental objections to the recall made the measure acceptable. Vigorous campaigns in both States are being made to defeat these amendments. They do not find favor among representative members of either of the two leading political parties. They were passed by legislatures during a sort of epidemic of so-called "progressiveism." They were incited by the then too prevalent belief that any radical change, if it only be branded as "progressive," was a step toward reform.

But this epidemic of radicalism is waning. There is now less tendency to confound change with progress. The pendulum of public opinion is returning to its normal range of swing, far within the extreme limits of revolution on the one side and of obstinate and unreasonable standpatism on the other. To-day a man is not so much considered an archaic reactionary just because he insists on stopping to deliberate, or even to debate, before accepting the proposition, for instance, that the constitutional safeguards to liberty and property may be disregarded by a court, if such court shall deem it for the public interest in any particular case. To-day a man is not so much a "plutocrat" if he insists that capital invested under constitutional protection shall not be deprived of adequate returns simply for the sake of increasing the public revenue. To-day there are fewer audiences in this country before which a man's opinion could be derided and scorned as that of a "conspirator" in favor of "allied invested interests," solely for the reason that he advocates the preservation and maintenance of our constitutional form of democracy instead of its subversion, by striking at the independence of the judiciary, or by wresting from the judicial department of our Government the power to exercise the essential and fundamental judicial function, the maintenance of which is the keystone of our form of government—the function of passing final judgment upon the constitutionality of statutory provisions.

## THE JUDICIAL RECALL ON THE WANE.

There are, throughout the Nation, significant evidences of increasing enlightenment upon the question of judicial recall. While the average voter has as yet insufficient appreciation of its baneful character, nevertheless there is a perceptible change in sentiment showing itself among the people of the different States. Former leading advocates of the judicial recall are saying less about it. Some of them are now saying nothing about it. Many have retreated to a position less repugnant to constitutional government. For instance, there had been most persistent advocacy of the judicial recall in Ohio. The president of the recent Ohio constitutional convention and many influential members of that convention, who are not learned in the law, were, and still are, advocates of the recall of judges and of judicial decisions. Yet that constitutional convention refused to refer to the electors of Ohio the proposition of judicial recall. Instead that convention proposed a State constitutional amendment, which was adopted by the people, providing that no act of the legislature, duly approved by the executive and not vetoed by the people through the use of the referendum, shall be declared unconstitutional by the State supreme court unless six of the seven judges concur. So in the constitutional amendment proposed for adoption at the general election this fall in Minnesota, increasing the number of supreme court judges from five to seven, it is required that a concurrence of five out of seven judges shall be necessary in order for that court to declare a statute unconstitutional. Colorado participates in the same plan. This has become known as the "Ohio plan."

In Colorado, however, a further amendment forbids the judges of certain courts from declaring a statute or ordinance unconstitutional on the ground that it contravenes the Federal Constitution. The jurisdiction and function of a State court, so far as observing the requirements of the Federal Constitution is concerned, are, however, fixed by that instrument, which makes it the sworn duty of every judge, Federal or State, to observe the provisions of that fundamental law as the supreme law of the land. This duty and function have been established, as an essential principle of our form of government, to include the power and obligation of every court, and of every judge of every court, to declare unconstitutional and unenforceable any statute, and any provision of any statute, which is repugnant to the prohibitions and limitations expressed in the Federal Constitution. Such duty and function, therefore, would seem to be not subject to abolishment or diminution by any legislative enactment or constitutional provision of a State. Accordingly, the Colorado extension of the Ohio plan is itself manifestly repugnant to the Federal Constitution, and, therefore, invalid. Depriving a mere majority of a State supreme court of the power to declare a statute invalid and unenforceable is less objectionable. Substitutes, such as the Ohio plan, for the drastic and subversive judicial recall measures have the merit that they are, at least, less repugnant to our system of government.

Indeed, as through the initiative and referendum the powers of State legislation become more and more under the direct arbitrary

action of the electorate, it is necessary, for the proper protection of personal liberty and property rights, that the safeguards of the Federal Constitution should, more than ever, come within the direct jurisdiction of the Federal Supreme Court. Under the present Federal judiciary act that Federal jurisdiction, as applied to the review of judgments of State courts upon the constitutionality of State statutes, is limited to a review of the judgments of State courts wherein statutes are held valid. The American bar has long advocated the extension of that Federal jurisdiction also to decisions of State courts wherein a State statute is held invalid upon Federal grounds; but it seems difficult, and perhaps impossible, to get such extension through the Federal Congress. At the present time a majority of a State supreme court may generally declare a State statute invalid. The more difficult it is made for a State supreme court to invalidate a State statute, the more is the opportunity increased to have the constitutionality of a State statute adjudicated by the Federal Supreme Court. Where now usually a majority of a State supreme court may invalidate a State statute upon Federal grounds, the final judgment of the highest court of that State as to the constitutionality of such statute must, under the Ohio plan, be in favor of its validity unless more than a majority of the State court are against it. This would increase the number of cases where a writ of error would lie to the State court upon an adjudication of a constitutional question. I am not advocating the Ohio plan, but simply suggesting that, for existing insufficiencies which are recognized by the bar generally, it offers some elements of remedy consistent with our form of government. In that respect it differs from the judicial recall, which is lacking in remedial character and is subversive of our form of government.

#### THE DILEMMA OF THE ADVOCATE OF JUDICIAL RECALL.

An interesting and encouraging phase of the judicial recall controversy has emerged in the form of a dilemma with which the recall advocate is, under present conditions, squarely confronted. The widespread opposition arguments to the judicial recall have brought a wholesome enlightenment to thinking citizens. Its representative advocates have generally been superficial theorists, to whom an intelligent comprehension of our system of government is impossible. Some have been conscientious, but sadly lacking in those foundations of knowledge for which a proper grasp of the subject is necessary. Some have been reckless agitators, disciples of unrest, who, not from lack of intelligence, but from lack of proper regard for our free institutions, have been willing to exploit themselves as advocates of a drastic and suicidal specific for existing evils in the administration of government. The demagogue is always with us. Men, including some who were once sane leaders of thought and of action, have been willing to feed the fires of revolution by catering, not to the intelligence, but to the lack of intelligence, of those who would pretend to believe that our Government is an organized system of oppression. Then there is the socialist doctrinaire, whose propaganda of enmity to our Constitution and the Government established under it has been spread broadcast through pamphlets, the socialist

press, and by the street-corner orator. The methods of the advocacy of judicial recall by all these agitators have been marked by a wholesale denunciation of the judiciary and of the judicial function under our system of government, the stability of which depends upon the maintenance of the integrity and independence of its judicial departments. This propaganda of disruption has also been furthered by the professional or chronic muckraker, appearing in the form of a contributor to or editor of some magazine of wide circulation, or in the form of some political or judicial pervert who allows himself to become the instrument of socialist teachings.

It was formerly sufficient that the judicial recall shouter should detail both real and imaginary evils in the administration of law as the source of all social injustice, and, without analysis and without disclosure of its real significance, should then urge as a panacea the assertion by the citizenship of the Nation of the right arbitrarily to recall a judge, or of the right at a mass meeting of the voters or through a referendum ballot and in violence of the judicial function directly and arbitrarily to adjudicate the constitutionality of a statute. Voters were thus at first misled by the impression that by the removal of limitations upon the arbitrary power of the electorate we would have a government which was nearer to a pure democracy, and that in so far as our democracy limited the powers of the people it was the means of oppression. Thus through hue and cry the fallacies of the judicial recall gained a strong hold upon the minds of the voters in many States.

But, in the meantime, a campaign of education has been continued by the opponents of judicial recall. Through their efforts people are recognizing more and more the fact that rules of conduct are necessary in governmental affairs as well as rules of conduct in regard to ethical duties between man and man; that for the protection of the individual and of minorities against the oppression of the whim and caprice of local and temporary majorities, it is necessary that the legislative power of the majority be limited, and that in no other way can the personal liberty and the rights of property and the pursuit of happiness be vouchsafed to the citizens of a constitutional democracy. The fact is further becoming recognized by the citizen voter that rules of conduct in governmental affairs are meaningless without some established power of their enforcement, and that such assurance can only rest in the maintenance of an independent judiciary, to whom shall belong the function of setting aside any arbitrary legislation of a majority which deprives the individual or the minority of the rights which are thus safeguarded. The attack upon the established judicial function which is made by the judicial recall, has been discovered to the people as an attack upon their rights and liberties, because it is an attack upon the safeguards established for their protection.

To-day the judicial recall advocate has to face the proposition, to which he is now forced by the increasing enlightenment of his audiences, that he must either recede from his advocacy of judicial recall or must take the position of one who is avowedly an opponent of our present form of Government. He is, therefore, relegated to the position of the socialist agitator just as long as he persists in his advocacy of the judicial recall. Placed in that dilemma, many of its



former advocates have shrunk before the alternative thus forced upon them and have given up the subversive proposition of the judicial recall and have become identified with measures less revolutionary. Some have become advocates of the "Ohio plan," requiring more than a majority decision of a court to declare a statute unconstitutional.

One of the salutary effects of this agitation has been to strengthen the cause for which the American bar has been for years working—the cause of remedial reforms in the administration of justice. That cause has advanced in the past few years with rapid strides, as shown by the adoption of various statutes and rules of procedure eliminative of former obstacles to the efficient enforcement of the law. Organized efforts for further reforms, which promise effective results, are shown by the investigations and the reports which are now in progress on the part of the National and State bar associations and on the part of associations not controlled by lawyers. The National Economic League, through its committee of 200 selected from all parts of the country and composed of the most distinguished lawyers and laymen, has, through its preliminary report just published, outlined a systematic movement for thorough reforms corrective of present evils and promotive of the best efficiency in the administration of justice.

#### A QUESTION OF SOCIALISM—NOT OF POLITICS.

The most healthful sign of the times is that, in view of the dilemma thus now confronting the judicial-recall advocate, the agitation of judicial recall is becoming less a matter of party politics. The two great parties of the Republicans and of the Democrats are already on record, through their platforms and the expressed views of their representative leaders, as repudiating judicial recall. The third-term party two years ago deemed it consistent with its arrogated monopoly of all progressive ideas to ally itself with the advocates of the recall of judges and of judicial decisions. The Socialist-Labor Party, which was the first party to install a judicial-recall plank in its platform, still adheres to its support of the judicial recall as an instrument of socialism. The last-named party will probably continue the only party which has, as a part of its fundamental political creed, a doctrine subversive of the judicial function and of our Government. In that position it is consistent, because the avowed object of that party is to overturn our Constitution and our form of government and to destroy rights of property and of personal liberty of which our present system of government is protective.

It is true that the third-term party candidate for governor in Pennsylvania is a noted apologist for the judicial recall. It is also true that that ex-President, who is a domineering—even if not now a dominant—factor in third-term party politics, has been a conspicuous advocate of the recall of judicial decisions. This ex-President, however, has evidently been made to feel the unwisdom of his ways in this regard, for of late he has been most eloquently silent on this subject of the judicial recall. The third-term party in New York has abandoned not only the recall of judges and of judicial decisions but also the initiative and the referendum. Their State platform carefully avoided the judicial recall planks which were a part of their

last national platform. In the present political campaign in Michigan the Republican nomination for governor has been captured by Mr. Osborn, despite the fact that he is obsessed with the judicial recall fallacies. Representative Republicans in that State, however, have called upon him openly to repudiate the judicial recall, under the penalty, if he refuses, that they will withhold their support and, independent of politics, join with the Democrats in the election of a candidate whose views on the judicial recall are not both anti-Democratic and anti-Republican. Leading papers in the State of Michigan are urging a repudiation of the judicial recall in State and county conventions. The Detroit Free Press, an influential and independent newspaper, is urging to the voters of Michigan that, regardless of partisan politics, they refuse to support any candidate or any party which, by acceptance of the judicial recall, becomes an ally of socialism. In advance of the Republican State convention in Michigan, county conventions are adopting resolutions condemning judicial recall. In Minnesota, where the people this fall vote upon a constitutional amendment authorizing judicial recall, the Republican candidate for governor has been called upon to announce himself in opposition to the proposed amendment. The rank and file, as well as most of the representative leaders of both the Republican and Democratic Parties, demand that the judicial-recall measures be repudiated. Those third-term party leaders who show signs of recovering their sanity are tending in the same direction.

THE SOCIALIST THE ONLY CONSISTENT ADVOCATE OF JUDICIAL RECALL.

The advocate of judicial recall is an ally of socialism. The fact is obvious that to-day the judicial-recall advocate is generally regarded as a vagarist. And so he is, except from the viewpoint of one who either is a Socialist or is tainted with socialism. So long as he persists in adherence to this heresy, which is repugnant to constitutional government, he is to-day forced to preach the doctrines of socialism as the only consistent basis for his fallacies. The most logical opponent of our Constitution is the Socialist. He is the foremost of its antagonists, the first in priority of time, the most active and the most persistent. The Socialist, however, frankly admits that it is a part of his social and political creed to destroy our Constitution and our Government, and to do away with rights of private property and, indeed, with all rights so far as safeguarded by constitutional provision. He frankly avows that among the barriers between socialism, on the one hand, and an orderly government with constitutional safeguards, upon the other, the first that must be broken down is the present established authority of the judiciary to render unenforceable any statute which contravenes the express protections of the Constitution. He would wipe out these barriers, if possible, by repeal of the Constitution itself; and, until such repeal shall be accomplished, he would destroy constitutional protection by eliminating all power of its enforcement.

It is a part of the Socialist creed that vested property rights in this country have, by subtle and insidious processes, been stolen or usurped from the people as a whole. It is further a part of that creed that the judicial function under our constitutional government

of adjudicating the constitutionality of a statute was also, by devious methods, stolen or usurped by the courts themselves, and that this was done for the benefit of, and through the procurement of, conspirators representing the interests of property holders and in violence of the social and political dogmas of socialism which defy all restraint, and which, therefore, defy all protection by the Government of property and personal rights. This right of private property and this power of its safeguarding through the exercise of the judicial function are therefore to the Socialists both a right and a power which neither any citizen nor the citizenship of the Nation or of any State is under any obligation to respect. They would eliminate both by indirect methods if possible, but if necessary they would destroy both by any direct methods efficient for that purpose.

It is significant that the instrument which the Socialists would use for this revolutionary change is the judicial recall. The modern advocacy of the judicial-recall measures sprang from socialism. The present Socialist-Labor Party was the first political party in America to demand the recall. The judicial-recall measures are essentially mere instruments of socialism. As stated by the leading organ of the Socialists, the Appeal to [T]Reason, speaking of the judicial recall:

It is the means whereby the people will be enabled to inaugurate socialism, and after that is done they may secure democracy in industry.

So the Socialists inveigh against the Constitution and against the judiciary. It is the platform of the national Socialist Party which, after the recall plank, urges the abolition of the power of the courts to declare statutes unconstitutional and claims that this power has been usurped by the courts. The same platform further declares that these measures—that is, the recall measures and the abolition of the functions of the courts—

are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance.

Keep these facts in mind when you are told by others, who know or ought to know better, that the powers exercised by our courts have been “arrogated” to or “usurped” by the courts themselves; and when you are urged to wrest from the courts their chief functions and to turn over to the people the direct control of judges or the direct adjudication of constitutional questions.

#### THE SOCIALIST VIEW OF THE FEDERAL CONSTITUTION.

The Socialist view of our Federal Constitution may be assumed to be authentically presented by a recognized Socialist who contributes to a certain American monthly magazine, which, before its period of decadence, had some elements of respectability. Some of you may remember, even in these days of its obscurity, a monthly periodical known as Pearson's Magazine. Within the past three years this magazine has been exploiting in its columns such unwarranted and dastardly attacks upon our Federal Constitution that it has thereby sufficiently demonstrated its right to the boast flaunted upon its cover page that it prints stuff “that others dare not print.” Even in this day of sensation mongers it is probably true that no

other publication would have had the effrontery to violate truth, to shock all sense of decency, to the extent that this magazine has done. It ridicules the term "patriot fathers" as applied to the framers of our Constitution. It brands them as "grafters" who initiated and carried through a change in our system of government and framed and established a constitution, upon a plan which "was never meant to bring about rule by the people," but which was adroitly put together and the adoption of which was surreptitiously and deceitfully procured all for the sole purpose "to enhance the value of their own property holdings and to tighten and increase the burden of the shackles which theretofore existed upon the liberty of the common people." The Constitution of the United States, it says, was made for the people "in the same sense that sheep shears are made for sheep. The gentlemen who made the Constitution had sheep to shear." This is the view presented by a 1913 American journal, and in support of its propositions it indulges in a mess of misinformation and of garbled and distorted citations from authorities.

To such an extent has this periodical joined the forces of the Socialist propaganda that the reprints of its articles, reviling the Federal Constitution and its makers and expounders, have become religious tracts and textbooks of enormous circulation in Socialist circles. The unfortunate feature of this Socialist propaganda is, that these vitriolic pamphlets, copyrighted, sold, and distributed by the publishers of Pearson's Magazine, have had, and are still having, a poisonous effect upon the minds of many editors, magazine writers, newspaper men, and citizens generally, who are misled by these instruments of error.

#### THE CLIMAX OF SOCIALIST DEFAMATION.

Not content with reviling the Constitution and its makers, the Socialist goes to the extreme of defaming the signers of the Declaration of Independence and the instrument itself which declared the separation of this Nation from the tyranny of monarchy. In a "patriotic edition" of the Socialist organ, Age of Reason, published at Dallas Tex.—its last July number—it is declared that the patriots of the Revolution, when they returned home from their battles—

found that the thieves of America had written this document to fool the workers with. \* \* \* They were then compelled to go to this robber-creditor class (who had written the beautiful document above referred to) for supplies to make a crop. These liberty-loving thieves were also the lawmakers—the makers of the laws they had passed to imprison men for debt. \* \* \* Could the demons of hell hatch a more damnable plot against the working class? \* \* \* Just a few men have the right to make the laws, hence they make the laws so that just a few men can own the property. \* \* \* They framed this document so that it would arouse the ire of the working class and cause them to rise up and drive the British out of this country, and give to this bunch of American capitalists the right to make the laws so that they could take the place of the English capitalists and rob the working class.

And more of the same twaddle, ad nauseam.

#### ALLIES OF SOCIALISM.

It would be useless to detail these shocking affronts to the sense of decency of enlightened citizens, except to bring home to our minds the malignant forces of disruption with which many persons, who



would repudiate socialism as such, have, in fact, become allies. For the Socialist is to be commended in his attacks upon the Constitution as compared with the less frank, the subtle and insidious attacks indulged in by those who either know, or ought to know, better.

Aristotle defined a demagogue as one who catered to the prejudices of the people by attacking existing institutions, and particularly the judges and other magistrates, and urging more power for the people, to be expressed by popular majorities, although leading to a nonconstitutional democracy of a sort which is analogous to a tyranny.

Aristotle's definition applies to-day to many conspicuous advocates of the judicial recall, some of whom I shall mention.

Ex-President Roosevelt has demonstrated that he is afflicted with what physicians or alienists would term an incurable idiosyncrasy for all legal and constitutional questions. He has just been telling the citizens of the South American Republics, whose Governments are modeled upon our own, that our constitutional system of government is wrong and that the prime function of our courts is performed only through usurpation of judicial power. In his speech the other day at Buenos Aires he aligned himself with the Socialists who advocate the destroying of constitutional safeguards and then the wresting from owners of holdings of private property.

Roosevelt allied himself with the Socialists, advancing the doctrine which is a creed of socialism, when he said, at Buenos Aires, that the power at present exercised by our courts to preserve and enforce constitutional safeguards is a power "arrogated" to and "usurped" by the courts themselves. He further allied himself with the socialist method of muckraking our Constitution and our judicial system when he stated, at the same time, that for more than 30 years the courts of this country have exercised their powers with "inexcusable and reckless wantonness on behalf of privilege," and against the interests of the people. This statement is no mere lapse from overenthusiasm, for he assures us that he makes it "gravely and deliberately." We have in him, then, an ex-President preaching socialism. For this attack upon our judiciary is precisely the same as that which has been continuously for years (and also, in the words of Roosevelt, "gravely and deliberately") made by the Socialists as the basis for their doctrine that the Constitution with all its safeguards should be wiped out. Moreover, the instruments of destruction which they advocate as the most efficient to accomplish this end are precisely the same judicial-recall measures that are urged by Roosevelt.

Roosevelt refers to the decision recall as a newly discovered remedy—as "My remedy"—although it was thoroughly discussed and unanimously repudiated in the Australian constitutional convention 10 years before, evidently, he ever heard of it. It was rejected as manifestly inconsistent with and repugnant to a constitutional form of government; and this, too, at the same time that the enlightened and progressive people of that entire continent adopted a constitution modeled in all its essential features upon that of this country.

"EVERYBODY'S" SHOULD BE NOBODY'S.

Another unscrupulous and despicable contributor presented some time ago in another magazine (Everybody's—it should be nobody's).

a venomous attack upon the judiciary, in which he traduced individual judges, maligned the courts, and calumniated the entire judicial department by false statements, by subtle innuendos, which undoubtedly brought conviction to the general mass of unthinking readers, but which to discriminating persons brought only the reaction of an intense shock to their sense of decency. The Tennessee bar may be proud of the manner in which one of its members paid his respects to this "Connolly person" journalist; and if any of you should wish to read in print the sentiments of protest which you felt at the time, I would refer you to Mr. Caruthers Ewing's speech two years ago before the Georgia State Bar Association.

#### THE JUDICIAL PERVERT.

Such are the various and eccentric moods of the human mind that it is not astonishing that, now and then, even a member of the American bench should be found so to partake of the characteristics of the pervert as to allow himself to become allied with those whose creed is based upon a derision and revilement of our Constitution, of our constitutional democracy and of the administration of our Government. No Socialist has gone to a further extreme of malignant vituperation in discussing our Federal Constitution and its makers and expounders than has a certain chief justice of the supreme court of one of the oldest States of the Union. Let me say here, for the North Carolina bar and for the citizens of that State, that when recently I denounced the views of this judge and their utterance from such a source (which it was my pleasure and privilege to do in the presence of this chief justice and before the bar of his State) the fact was demonstrated to me that his assaults upon our Constitution and upon the judiciary of the Nation and his advocacy of judicial recall, have been and are offensive to the press, to the bench, to the bar, and to citizens of that great State. I doubt that 1 per cent of the bench and bar or of the citizens of North Carolina have any sympathy with the apostate attitude assumed by this chief justice upon these questions.

Chief Justice Walter Clark of the Supreme Court of North Carolina, in his address at Cooper Union, New York, last January, chooses to view the issues of reform, social, economic, and constitutional, which have been and still are pressing, as merely issues between an unrighteous controlling class, upon the one side, and an oppressed class upon the other. The past and present issues of judicial reform, of the framing, construction, and enforcement of our Constitution itself, all these issues have been and still are simply the struggle between the "exploiters," upon the one hand, and of the "exploited," upon the other hand.

The Constitutional Convention at Philadelphia in 1787 assembled, he says, only "for the nominal purpose" of creating better business and commercial relations between the States and to supply the need of a stronger Union. In default of the trust imposed upon them, and using the pressing necessities only as a pretext for their selfish ends, the framers of our Constitution shaped that instrument "with sublime audacity," as he says, with the very intention and with the very result that the "reactionary" "exploiters" of an oppressed

people then took and have since maintained control of our Government. As "the allied vested interests" then intentionally made the Federal Constitution an instrument of oppression and injustice, so they next, by various means, persuaded the different States to its adoption. The same "vested interests" afterwards procured, to be stolen or "usurped" from the people, the power, never intended for the courts, of the judiciary to declare invalid and unenforceable statutes repugnant to the express prohibitions of the Constitution. This was a further grasp of power by the designing "exploiters" in control. More than that, the courts of the land, he asserts, have become, by usurpation, the arbitrary, capricious, and oppressive rulers of the people. The fourteenth amendment "means anything and everything that the judges see fit." The decisions of the Federal Supreme Court have been subtle perversions of the law and the reasonings of those decisions are mere instances of "sardonic irony" and of "adding insult to injury."

This chief justice reechoes the Socialist cry when he says, referring to the discontent prevailing among certain classes of citizens:

The progressive and humanitarian measures necessary to the betterment of their condition are almost invariably negated by the courts, whose sympathies are with the propertied class and vested rights.

To overturn this "government by judges"—a government which is "very largely a plutocracy"—he would deprive the judiciary of its power of final determination of constitutional questions and would leave the adjudication of such questions to a referendum ballot through the recall of judicial decisions or would deprive the courts entirely of their power of declaring any statute unconstitutional. He would, therefore, replace our system of judicial functions with that which is in vogue in England; although, as is well known, English statesmen have deplored the deficiencies of their system and praised the American judicial function as a scientific model for all the world.

Our confidence in the correctness of the observations of this jurist is not increased by the fact that he tells the people of New York that it was judicial usurpation when the United States Supreme Court overruled "your State statute" in the *Lochner* case, and that in the same decision Justice Holmes makes a certain statement in regard to the police power, for the statement quoted from Justice Holmes was not made in the *Lochner* case, but appears, in connection with an entirely different state of facts, in the later case of the *Noble State Bank v. Haskell*.

Before you, before any citizen of well-balanced intellect, not tainted with the enticing but fallacious dogmas of socialism, who has studied the subject impartially, it is unnecessary to offer an answer to the jibes and epithets with which Chief Justice Clark characterizes our Constitution, its makers, and its expounders. A lawyer of the American bar naturally resents such derision of our institutions, especially when uttered in such a spirit from such a source.

But consider the effect of such utterances, especially from such origin, upon masses of the people, untaught in the science of Government, many of whom are already incited to restlessness and even to open defiance of authority. Why thus wantonly and recklessly furnish encouragement, aid, and ammunition to the forces of disruption?

Why thus excite further the already too prevalent spirit of antagonism to our free institutions? Why thus feed the fires of unrest, of discontent, and even of rebellion, which are even now threatening devastation?

The primary purpose of public discourse touching the relations between the Government and the individual should be to inculcate methods of calm, deliberate, impartial study and consideration on the part of the citizen, and to help to bring to him an enlightened appreciation of the necessity and wisdom of established rules of conduct in governmental law, as well as in respect of social relations; to teach the citizen that his selfish whim, caprice, prejudice, or interest must yield, to some extent at least, to the general interests of the community; that the general public interests can not be safeguarded without lawful submission to the authoritative enforcement of the protective provisions of the fundamental law, which are such rules of conduct established for the good of the Nation; and that that Government is ultimately the most wise and beneficent, as well as the most stable, which is founded upon enforceable rules of conduct protective of the individual and of the minority, as well as of the majority. The object should be to promote better citizenship.

If the holding up, before the people of our Nation, of our Constitution and our American form of government to the derision and contempt of its citizens is promotive of better citizenship, then "better citizenship" means the citizenship of socialism; it means the rule of the dynamiter. Justice Clark's address would make an orthodox chapter in the creed of the socialists, or a consistent editorial in their organ, *The Appeal to Reason*, or in the anarchist organ, *Mother Earth*. You will note that Chief Justice Clark shows more familiarity and more sympathy with the propaganda of socialism than he does with the Federal Constitution or with the decisions of the Federal Supreme Court.

And yet this muckraker of our Constitution and courts has had the audacity recently to aspire to appointment as Justice of the United States Supreme Court! If thus holding in contempt the institutions of this country, he were a foreigner and as such should come before one of you, sitting as a judge to pass upon his application for naturalization, what, do you think, knowing his views, would be your judgment as to his qualifications to take the oath of allegiance and citizenship?

#### THE JUDICIAL RECALL NOT REMEDIAL, BUT SUBVERSIVE.

The recall of judges has the effect to subject judges to the constant menace of the arbitrary will of the voters of the judicial district in which they preside. It leaves to a mass meeting of voters, controlled by a majority of those who happen to be present, the arbitrary power to unseat a judge. The exercise of the recall in Oregon has shown that, despite the pretention to the allowance of a defense and hearing, the decision of the voters is controlled by hue and cry and that the system is merely a return to the ostracism of ancient democratic tyrannies. Its effect is only to lessen, to the point of destruction, whatever of independence is left to the judge by the judicial elective system. It invites, even compels, a judge to keep his ear to the ground

and to anticipate the changing whims of popular passion. He is made a servant, not of the law, but a mere spokesman of the caprice of majorities. The system, therefore, is one which tends to eliminate the protective force of constitutional safeguards.

The judicial decision recall is more directly subversive of our system of government. Its effect is to vest in the makers of a statute the power to dictate as to its enforcement, irrespective of the question whether or not it deprives any citizen or any set of citizens of their liberty or property without due process of law. Indeed, the enforcement of such a statute, under the decision recall, is not left to its legislative authors, who may be supposed to have given to it some method of deliberation; its enforcement is left to a mass meeting of the electors of such legislature.

#### THE COLORADO EXAMPLE.

The best illustration of the real significance of the decision recall is the Colorado example.

Under the recent Colorado amendment a supreme court decision declaring unconstitutional any State statute may be made ineffective by a majority of the votes cast by State electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the judicial decision recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide whether in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day and another way another day with reference to the same provision. One city might decide one way and at the same time another city another way with reference to the same provision.

Now, what do you think of the wisdom or sanity of those pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive" methods, as merely "a new method of constitutional amendment by popular vote"?

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a *reductio ad absurdum* of the decision recall argument.

#### THE FALLACY OF JUDICIAL USURPATION.

The most common fallacy leading to the greater fallacy of the judicial recall is that arising from the too prevalent misrepresenta-



tion and the resulting misunderstanding with reference to the nature of the judicial function under our system of government. This fallacy is embodied in the socialist doctrine that the judiciary has "usurped" the function to pass final judgment upon the question as to whether a statute is repugnant to the Federal Constitution. This fallacy is the product of socialism, with which certain present-day agitators have become infected to the extent that they, too, proclaim that this function of the courts has been "grasped" by the courts themselves. Some refer to it as a "veto" by the judicial department upon the acts of the legislature. Others refer to it as an arrogated power of "judicial nullification," unwarranted under a proper view of judicial functions. They would deprive the courts of that function which is essentially the function of the courts—the function of weighing the facts and the law as applied in a particular case to a particular statute and afterwards of expressing in a final decree their deliberate and well-considered judgment upon the question of constitutionality. They would substitute, in the place of the careful judgment of a tribunal of triers experienced in the trial of facts and learned in the law, the arbitrary and capricious prejudgment of comparatively incapable arbiters declared at a mass meeting or at a referendum election.

As this claim of usurpation is the foundation of the hue and cry made by the socialists and their allies, and is such a common basis for the judicial recall arguments, let us here note briefly some reasons why it is unfounded. The same chief justice, heretofore referred to, has publicly stated with reference to this judicial function:

The possibilities of the court were not understood, and indeed were unknown until the vast extension of power was grasped, without any grant in the Constitution itself, by an obiter dictum opinion in *Marbury v. Madison*, \* \* \*. The importance, indeed the overwhelming preponderance, of the judiciary in the Government was unexpectedly created in 1803 by a decision of the Supreme Court of the United States, without a line in the Constitution to authorize it, when that body assumed the right to nullify and veto any act of Congress that they chose to hold unconstitutional. This astonishing declaration was made in the case known as *Marbury v. Madison* by Chief Justice Marshall. The doctrine was shrewdly set forth in an obiter dictum, \* \* \* promptly seized upon as a boon by the special interests and by all who at heart believed in the government of the many for the benefit of the few.

Let us pass the imputations as to the motives of Chief Justice Marshall and review a few facts, the accuracy of which is demonstrated by printed records and statutes. We may draw for our matter upon authentic records of events and upon Federal statutes antedating the "surprise" of 1803; instead of misquoting the decisions of the Federal Supreme Court or branding them as "shrewdly" perverse to the law, and also instead of adopting obiter dicta from socialist textbooks.

That our fundamental law makes the enforcement of constitutional safeguards the primary function of the judiciary, Federal and State, was demonstrated by Chief Justice Marshall in the famous case of *Marbury v. Madison* (1 Cranch, 137), in which Chancellor Kent declares—

the power and duty of the judiciary to disregard an unconstitutional act of Congress or of any State legislature were declared in an argument approaching to the precision and certainty of a mathematical demonstration.

The limitations of the Constitution were expressly made the supreme law of the land, binding upon all courts, Federal and State, and with the duty, under oath, of every judge of every court to observe them as the paramount law of the land, Chief Justice Marshall demonstrated that, not only by express provision but also by necessity, it was the duty of the courts to declare unenforceable a statute which contravened the Constitution. He said:

The powers of the legislature are defined and limited, and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing. If these limits may at any time be passed by those intended to be restrained? \* \* \* A legislative act contrary to the Constitution is not law.

It is urged by the Socialists and by their coadjutors, the advocates of the judicial recall, that this decision by Chief Justice Marshall was a usurpation by or arrogation to the courts of a power not expressed and never intended to be enforced as a constitutional judicial function. No better answer to this claim can be made than the convincing arguments of Marshall in the case of *Marbury v. Madison*. But that this was the interpretation of the Constitution upon the faith of which, more than any other single feature, the original States were persuaded to accept it, is shown by the various arguments of Ellsworth, Hamilton, and others prior to its adoption. Hamilton urged in the *Federalist*:

There is no liberty where the power of judging be not separate from the legislative and executive power. \* \* \* The complete independence of the courts of justice is peculiarly essential in a limited constitution. \* \* \*. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the commands of the Constitution void.

Upon the same ground Ellsworth, on January 7, 1788, urged the ratification of the Constitution upon the Connecticut convention, when he said:

If the general legislature should at any time overlap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the States go beyond their limits, or if they make a law which is a usurpation upon the Federal Government, the law is void; and upright independent judges will declare it so.

This doctrine of the judicial function had been prevalent in the States of the Federation prior to the adoption of the Federal Constitution, and had been recognized in the State of North Carolina, where, in the case of *Bayard v. Singleton* (Martin's Repts., p. 42), it was advanced by Mr. Iredell, who was subsequently an Associate Justice of the Federal Supreme Court. Indeed, 14 years before the decision of Chief Justice Marshall in the case of *Marbury v. Madison*, and immediately upon the adoption of the Federal Constitution, the Federal judiciary act was passed by the First Congress under the Constitution, expressly providing, as it has ever since provided, for the review in the Supreme Court of the United States of the judgments of inferior Federal courts, as well as for the review of cases where the validity of State statutes or any exercise of State authority should be drawn in question, on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision should be in favor of their validity.



Now, how can any man, who is informed of the facts and who at the same time is sane and conscientious, for a moment say that the judicial function of declaring statutes unenforceable which are repugnant to constitutional prohibitions was usurped or "created" through the decision of Chief Justice Marshall in 1803, and that theretofore it never existed in fact and was never before recognized and was never before intended to be recognized in our American jurisprudence? Why, not only had it been so understood by the States in their adoption of the Constitution, but almost the first act of the American Congress under that Constitution, and 14 years before Chief Justice Marshall's decision, was to write that particular judicial function into the statutes of the United States, and in the very form and wording in which it has ever since been expressed.

This act was drawn by Oliver Ellsworth, the third Chief Justice of the United States, and himself a member of the Federal Convention. Thus the First Congress confirmed that theory of the Constitution, on the faith of which its adoption by the States was procured, and which was further confirmed and demonstrated by Chief Justice Marshall, in the first case in which it was passed upon by the Federal Supreme Court—that the question of the repugnance of a statute to constitutional prohibition is a judicial question, the determination of which belongs, under the Constitution, to the courts; and that the final determination of the repugnance of a statute, Federal or State, to the Federal Constitution belongs to the United States Supreme Court.

This charge of "usurpation" is a mere pretext for striking at the very keystone of our system of government.

#### OUR CONSTITUTION A SCIENTIFIC MODEL.

It is not my purpose here to attempt a defense of our constitutional system of government. In contrast, however, with the methods of attack which I have outlined, let me here briefly note that the American Constitution, with its established functions of the judicial department, is in fact, and has become recognized as such throughout the world, the foremost scientific model of fundamental law.

The history of the advance of civilization has been the history of the emergence of the judicial conscience from the malignant influence of oppressive interference. As shown by Mr. Edward J. White, in his book to which I have referred, the Babylonians, more than 2,000 years before the Christian era, had the recall of judges and the recall of decisions by the exercise of the tyranny of monarchy. Under the pure democracy of ancient Greece, through the system of ostracism, was exercised the judicial recall in both its forms. So, under the unlimited democracy of the Roman Republic, the referendum ballot was used to inflict banishment or death upon the judges or to overrule their decisions.

The transition from comparative barbarism in governmental affairs, from the tyrannies of monarchy and of democracy which brought disgrace and disaster to the Governments of old, to an enlightened recognition by all classes of the necessity of a reestablishment of the judicial function, began when the English people wrested our Bill of Rights from King John at Runnymede. But that was only the first step; for it took centuries to bring home to the advancing Eng-

lish civilization the fact that bills of rights, no matter how assertive of the inalienable rights of the individual against the injustice and oppressions of the tyranny of arbitrary control, were futile to effect protection without the independence of that department by the proper exercise of whose functions they might be enforced. Such power of enforcement was lacking until the beginning of the eighteenth century; because, prior to that time, the English sovereign reserved and exercised the power of arbitrary recall of any judge, and judicial judgments were subject to the election of the sovereign. The statute of William III, however, enacted nearly a century before the adoption of our Federal Constitution, established in English jurisprudence the principle that the members of the judiciary, during the term of office for which they were selected, should be independent judges of the law and not the servile tools of either a monarchical or popular sovereignty; that their judgments when rendered should be enforced as the law, at least as the law of the case; and that their recall or that of their judgments should not be accomplished by hue and cry spread among the people to influence the results of a referendum election, the possibility of which, if recognized by law, always stands as a menace to the justness and independence of the judge and of his judgments.

It took centuries even to begin this revolt from barbarism. It took still further centuries to establish the principle of an independent judiciary as a requisite to the most enlightened system of jurisprudence ever known in the history and science of government. In the two centuries following, it was by the enforcement of this principle that meaning and efficiency were given to the fundamental doctrine of individual liberty embodied in the same Bill of Rights which is written into our own Federal Constitution, and made, by the same instrument, the supreme law of the land controlling upon all judges, State and Federal; and which has become also a part of every State constitution since formulated.

It was under this establishment of effective protection, not merely theoretical protection, of the individual and of the minority against the arbitrary caprice and oppression of local or temporary majorities, that has made stability, efficiency, security of life, liberty, and property of persons and of minorities, prosperity and enlightenment of its citizens, the characteristic features of the Government of this, the greatest Republic in the world's history. It is these scientific, practical, and effective features of our system of government which have made it the model for all modern governmental reorganizations and have made our Constitution and the government administered under it the objects of admiration and even marvel of the masters of the science of government. Gladstone characterized our Constitution as expounded by Marshall, "the most wonderful work ever struck off at a given time by the brain and purpose of man." Bryce, the greatest modern student and authority upon constitutional government, terms ours, as "the first true Federal State founded on a complete and scientific basis."

Lord Brougham, referring to our Constitution, said:

The power of the judiciary to prevent either the State legislature or Congress from overstepping the limits of the Constitution is the very greatest refinement in social quality to which any set of circumstances has ever given rise, or to which any age has ever given birth.

The English historian, John Morley, referring to the opinion of the world's students of government and their attitude toward our Constitution, said:

Everybody praises the American Constitution these days.

Lord Salisbury said, in 1882:

I confess I do not often envy the United States, but there is one feature in their institutions which appears to me the subject of the greatest envy—their magnificent institution of a Supreme Court. In the United States, if Parliament passes any measure inconsistent with the Constitution of the country, there exists a court which will negative it at once, and that gives a stability to the institutions of the country which, under the system of vague and mysterious promises here, we look for in vain.

If Lord Salisbury says this of the English system, what reply would he make to one who holds up to you as models above our own the judicial systems not only of England but of France and Germany? The French and German are systems still more “of vague and mysterious promises,” for the very reason that they are based to a still greater extent upon a disregard for precedents. A government of law can not exist where the only basis for arriving at the conclusions of fact and of law in a litigated case or in a criminal prosecution is the mere passing impulse of the triers with reference to what they may deem to be the merits. One might as well commend to us the system of Mexico. There is a Government, the administration of which is not hampered by any regard for precedents, nor by any regard for a constitution, much less by any regard for constitutional limitations. There is a Government administered without the intervention of any judicial functions, usurped or otherwise. In Mexico they are not bothered with precedents, nor even with any system of promises of protection to life, liberty, and property, either expressly written or vague and mysterious. The condition of Mexico is the logical result of the elimination of constitutional protection and of the debasement of the judicial function. To such a goal would the revilers of our American Constitution and judiciary turn the people of this Nation. Justice, equality, and consistency in the administration of law, protection for the established rights of life, liberty, and property require that all magistrates should act with a proper regard for precedents.

Shall we replace our present constitutional democracy with a democracy which has no enforceable bill of rights; which has no stable, sure, consistent, or equally administered constitutional protection for the individual as to his life, liberty, or property? Shall we destroy that stability of our institutions which, as Lord Salisbury said, is protected by the exercise of judicial functions as they are established under our Constitution? Shall we, by making the will of the legislature enforceable upon the demand of a popular majority, destroy constitutional protection, and make our system of Government also a mere “system of vague and mysterious promises”?

All this we do as soon as we consent to subject judges or judicial judgments to a referendum election.







# Vote "No (X)"

ON THE PROPOSAL (NO. 10)

"Amendment to Article Seven (7) of the Constitution Providing for the Recall of Public Officials"; to be Submitted at the Next General Election.



## First Prize Arguments

By Students of Minnesota Law Schools and High Schools

Against

## RECALL *of* JUDGES

*by*

HARVEY S. HOSHOUR of Duluth, Minnesota

*and*

ARTHUR O. LEE of Madison, Minnesota

(NOTE. In the November elections, since these arguments were published, the proposed Amendment was rejected; lacking about 40000 votes of the number necessary for its adoption.)



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## NOTE

During the past three years the American Bar Association through its Committee to Oppose Judicial Recall, of which the undersigned has been Chairman for over two years, has been working to bring home to the electorate of this State and of the entire Nation, the true significance of the Judicial Recall. The Recall, as applied to judges or to judicial decisions, is a proposition repugnant to our constitutional form of government. It is destructive of the judicial function. Its effect is to eliminate constitutional safeguards. It is in essence a Socialistic measure. It is anti-Republican. It is anti-Democratic. It is non-progressive.

The undersigned offered, last Spring, prizes to the high school and law school students of Minnesota for the best argument against the Recall Amendment (No. 10) which is to be voted on by the people of Minnesota in the coming November elections. This proposed amendment includes the recall of judges. The enclosed are the arguments prepared by Mr. Harvey S. Hoshour of Duluth, who won the first prize among the Law school contestants, and by Mr. Arthur O. Lee of Madison, who won the first prize among the high school contestants.

I can submit no better reasons than are here presented, for the rejection of the proposed recall amendment. These arguments not only present views with which I am in accord, but they show the conclusions of intelligent people who have studied the matter and who have come to those conclusions through intelligent consideration of the subject.

I commend these discussions to the earnest attention of the voters of Minnesota.

Respectfully submitted,

ROME G. BROWN.

Minneapolis, Minnesota, October 24, 1914.

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# **ARGUMENT BY HARVEY S. HOSHOUR**

**Of the Law School of University of Minnesota  
Duluth, Minnesota**

## **SUMMARY**

### **I. INTRODUCTION.**

- a. In Minnesota, popular government is securely established due in a great measure to the prevalent spirit of public discussion on current topics.
- b. The argument will be confined to the recall of judges alone, since they have different duties from administrative officers, and the same arguments do not apply to both.
- c. Under the proposed amendment, since judicial and administrative officers are grouped together, the man who is opposed to the recall of judges must vote "no" on the whole amendment.

### **II. THE ISSUES.**

- a. Is the recall of judges in line with our past policy? (III)
- b. If not so in line, is such a change desirable?
  - (1) Is the recall fair to the judges? (V)
  - (2) What result will the recall have on the effectiveness of the law? (VI)
  - (3) What will the effect be on the public and its rights? (VII)
  - (4) Will the recall remedy existing defects? (VIII)
  - (5) Has it worked well where it has been tried? (IX)
  - (6) What are the opinions of careful observers on the question? (X)

### **III. PAST POLICY.**

- a. The recall is not in line with our past policy, as a state or nation, in that it makes the courts dependent on the will of the people.

### **IV. THE BURDEN OF PROOF.**

- a. The burden of proof is upon those who propose such a change in our governmental policy—
  - (1) In that the test of our national and state experience supports the older form;

- (2) In that the recall of judges is out of harmony with the Constitution.

**V. THE RECALL IS UNFAIR TO THE JUDGES.**

- a. In that the method of defense provided for is inadequate to give the judge a fair trial;
- b. In that those who accuse the judge are also among those who decide concerning his guilt.

**VI. THE RECALL WILL MINIMIZE THE EFFECT OF THE LAW.**

- a. In that there will be a different rule in like cases;
- b. In that more litigation will result.

**VII. THE RECALL WILL HAVE A MALEFFECT ON THE PUBLIC AND ITS RIGHTS.**

- a. In that the rights of the weaker party will be infringed;
- b. In that the rights to life, liberty, property, and other constitutional guaranties will be jeopardized.

**VIII. THE RECALL WILL NOT REMEDY EXISTING DEFECTS.**

- a. In that the same people who elect a corrupt judge will vote at his recall, and also for his successor;
- b. The remedy of impeachment, properly regulated, is more effective than the recall in removing corrupt judges.
- c. The recall will not remedy the delay and technicality in our law.

**IX. THE RECALL HAS BEEN A FAILURE IN PRACTICE.**

- a. It has failed in foreign countries in the past.
- b. It was part of the Articles of Confederation, and was purposely omitted from the Constitution.
- c. It has been a failure in the western states which have recently adopted it—
  - (1) In that it has introduced bad practices in soliciting names for the petition;
  - (2) In that it has failed to interest a representative proportion of the people.
  - (3) In that it has introduced party politics into the judiciary.

**X. OPINIONS.**

- a. The opinion of representative men who have made a study of governmental duties, is opposed to the recall of judges.

## ARGUMENT

We, who live in Minnesota, believe in a government that places the power in the people; and we believe that this power should be just as close to the people, in every case, as is practicable and expedient. It is not by chance that Minnesota laws are among the most progressive in America; it is not by chance that such measures as the election of senators by popular vote, woman suffrage, and the initiative and referendum have made great forward movements here; nor is it by chance that Minnesota is the first state, having any of its territory east of the Mississippi, to vote on the recall of public officials.

That popular government is so securely established in Minnesota, is due—if to one thing more than another—to the prevalence throughout the state of discussion concerning questions of public interest. In the hope of helping in some measure in the discussion of the recall, now at issue, this article is written.

The writer's position on the recall is summarily stated by President Wilson:

“The recall is a means of administrative control. If properly regulated and devised, it is a means of restoring to administrative officials, what the initiative and referendum restore to legislators, namely, a sense of direct responsibility to the people who chose them. The recall of judges is another matter. Judges are not law-makers. They are not administrators. Their duty is not to determine what the law shall be, but to determine what the law is. Their independence, their sense of dignity and of freedom is of first consequence to the stability of the state. To apply to them the principle of the recall is to set up the idea that the determinations of what the law is must respond to popular impulse and to popular judgment. It is sufficient that the people should have the power to change the law when they will. It is not necessary that they should directly influence by threat of recall those who merely interpret the law already established.”

The argument, therefore, will be confined to the recall of judges, all of whom are included in the provisions of the proposed amendment. It is unfortunate that administrative and judicial officers are included together; but, if the people of Minnesota want a recall of legislative and executive officers,

such a measure can be proposed and voted on at another time. As the question will be presented at this election, every one who is opposed to the recall of judges, to make his vote effective, must vote "no" on the proposed amendment.

The question naturally resolves itself into two main issues. The first of these is: Is the recall in line with our past policy? The second: If it is not so in line, is such a change desirable? The second of these issues is the more important to the believer in popular government, though the first is by no means negligible in its effect on the decision of the thoughtful citizen. The second division of the question raises such component issues as: (1) Is the recall fair to the judges, in view of their duties and position? (2) What effect will the recall have on the stability and effectiveness of the law? (3) What effect will it have on the public rights? (4) Will the recall of our judges remedy existing defects in our law and courts? (5) Has the proposed plan worked well in other places? (6) What is the opinion of fair-minded and able observers on the question? I shall consider the issues raised by these questions in the order given, stating them positively rather than in the interrogative form.

#### THE RECALL OF JUDGES IS NOT IN LINE WITH OUR PAST POLICY

That the recall of judges is not in line with our past policy as a state and nation seems self-evident. Since the Constitution was adopted, it has been our policy to keep the judiciary independent of every external force, whether that force be popular will or executive control. The chief argument brought forward by the advocates of the recall, is that it will make the courts responsive to the people's wishes. That this is a decisive change in our past policy is indisputable, nor is the contrary argued by the proponents of the recall.

#### THE BURDEN OF PROOF

The issue then arises: Is such a change desirable? No thinking American will scoff at the wisdom of the men who formed our Constitution, that document characterized by Gladstone as "the most wonderful work ever struck off at a given time by the brain and purpose of man;" but, on the other hand, he will not accept any theory or practice of government,

as applied to our conditions today, simply because our fathers thought it best. He will consider all the facts, weighing heavily the opinions of those who formed our Constitution, in that it has stood the test of years. The words of Abraham Lincoln are applicable here:

"I do not mean to say that we are bound to follow implicitly in whatever our fathers did. To do so would be to discard all the lights of current experience—to reject all progress, all improvement. What I do say is that if we would supplant the opinion and policy of our fathers in any case, we should do so upon evidence so conclusive and argument so clear, that even their great authority, fairly considered and weighed, cannot stand."

The burden of proof rests then upon those who propose the recall.

#### THE RECALL IS UNFAIR TO THE JUDGES

Fairness is a thing on which we as Americans pride ourselves. To consider any question from the stand-point of those most affected is essentially American, and, to the thinking man, it is fundamentally essential.

The recall, as stated in the proposed amendment, does not give the judge a fair trial. In any important case the evidence and rulings of the court, upon which a recall could be based, will cover a number of volumes, and frequently intricate questions of law and fact will be involved. How can the voter determine, from a 200 word charge and a 200 word defense, whether or not the issues in such a case were correctly decided, and make that determination fair to the judge? How can the voter decide fairly, whether or not the court rightly interpreted the law, when the case may involve a hundred points and the authorities, on which the decision rests, may run back a hundred years? The question cannot be whether or not the law is wrong—over that the judge has no possible control—but only whether there was a correct interpretation of the existing law. Obviously it is unfair to take the newspaper reports of the case or what political speakers may say. A fair decision in the case of a recall of a judge, should involve a study of how learned and unprejudiced judges have interpreted the same or similar laws in the past, in this and other jurisdictions. How can all this be included in 200 words, so as to be fair to the judges?

Again, the judge is not treated fairly, in that his accusers form part of the jury. In our actions at law we exclude all those as jurors, who have even a remote interest in the litigation; but, under the proposed system, the judge is to be tried by a jury, 20% of whom have gone on record as being opposed to him, by signing the recall petition, and that too, without having heard the judge's side of the question. Is this fair to the judge? Are not our judges—even when they are on trial—to be given as fair a chance as the criminals who come before them?

#### THE RECALL WILL MINIMIZE THE EFFECT OF THE LAW

It is axiomatic that the civilization of a nation increases in direct proportion as the people of that nation have effective laws. A government without such laws is but a form of anarchy. It is not the duty of the court to make the laws, but only to interpret and declare them, and to make that declaration uniform in like cases, thus giving the laws stability and effectiveness. It requires no evidence to prove that a law applied differently in every case will have no stability nor efficiency; indeed it will not be a law at all. If the judge is subject to a recall, he cannot help but think more of what the people will think of his decision, than of the efficiency of the law. This will tend to bring about a different rule in every case; litigation will be increased, in that many suits will be started, which, if the law were settled, would never have been brought. The law will tend to become unstable, unsettled and ineffective.

#### THE RECALL WILL HAVE A MALEFFECT ON THE PUBLIC AND THE RIGHTS OF THE PEOPLE

Edmund Burke said:

“The poorest being that crawls on earth contending to save itself from injustice and oppression is an object respectable in the eyes of God and man.”

That, in essence, is the basis of our constitutional government. Here the rights of the poorest subject are above the power of any force to alter. If the proponent of the recall of judges wants an unanswerable reason why the judiciary must be independent, if the rights of the people are to be preserved,



let him think of the application of the above quotation to the plan he is advocating.

If the courts are not wholly independent, who is to protect the man who is contending for his rights against heavy odds? If an individual is suing, in a case where the supposed desires of the majority of the people are opposed to him, how can he get a fair trial? This squarely raises the question: Can a man have any rights, which a majority of those who vote at a recall election, think he should not have? That, indeed, is the crux of the whole situation. The man who believes that there can be no such rights—and only he—can consistently vote for the recall of judges.

Under our Constitution there are some things that no majority, however great, can change. Such are the right to the writ of *habeas corpus*, the prohibition against the passing of *ex post facto* laws, the right to be secure in life, liberty and property, and many other rights known to every American. To make the question personal and concrete, are you willing that your property rights, your liberty, your life, should be at the will of the majority of those who vote at a special election? In every case, on which a recall could be based, someone's rights—frequently someone's 'life—are at issue. The courts alone can protect these rights. If you make them dependent on a popular majority, then the rights that our fathers fought to attain are lessened and potentially gone, as the majority changes.

The words of Senator Root are applicable here. The recall of judges, he says,

“abandons absolutely the conception of a justice that is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion, and realized in the hard experience of mankind, and which has inspired every constitution America has produced, and every great declaration for human freedom since Magna Charta,—the truth that human nature needs to distrust its own impulses and passions, and to establish for its own control the restraining and guiding influences of declared principles of action.”

#### THE RECALL WILL NOT REMEDY EXISTING DEFECTS

In Minnesota there is little charge of corruption in the courts; our Supreme Court is said to be the most progressive state tribunal in America; the judges of our lesser courts are

men of eminence and dignity in every community. This raises the question: Why a recall with its incident dangers? But, granting that there is corruption in our courts, such corruption will not be remedied by the proposed system.

In the first place, if the people elect a corrupt and inefficient judge, the same people will vote at the recall, and again when a successor is elected. If the people are incapable of electing a fair judge, it is unreasonable to think that the same people will be able to vote rationally at a recall election, where the issues are sure to be much more involved. The same methods will apply in each election; the same parties will control and the same bosses, who put the corrupt judge in office, will replace him with another quite as corrupt and even more cringing to the will of his masters.

If the judge becomes corrupt after his election, no recall is needed, for we already have the remedy of impeachment. If impeachment is not workable now, its plan and form can and should be changed, so as to make it more easy of application. The difference between the recall and impeachment is, that in the latter case the judge is tried in accordance with the rules of evidence, and by those who have an opportunity fully to investigate the charges; whereas in the recall, the judge is tried by those, who in the nature of the case cannot have had a chance to learn all the facts, and by a group, 20% of whom are avowedly his opponents. In impeachment, the judge is given the sort of a trial that a criminal gets under our law, no more, no less. Regardless of fairness to the judges, which is the more effective to remove the really corrupt and inefficient judge?

Nor would the recall remedy the delay and technicality that exist in our law to-day. No particular judge is or can be responsible for these things, and the recall of any judge for such reasons, will not change them one whit. If there is too much delay, our procedure should be changed; if there is too much technicality, less technical laws should be made, not by the judges—who have no such power—but by the legislature.

#### THE RECALL HAS FAILED WHERE IT HAS BEEN TRIED

The idea of a recall of judges is no new thing. The judges of Babylon, four thousand years ago, were subject to a recall by the king; in ancient Greece, the people had the power of recall; in England, prior to the Act of Settlement, the king

had such a power; in France, during the Revolution there, such power was in the people. Every student of history knows the result in these cases. Babylon is of interest only to show what government should not be; the pure democracy of ancient Greece caused its downfall; the system in England produced a Jeffreys, made possible the Bloody Assizes and cost a king his crown; and in France the Reign of Terror was the result.

In America, the recall was part of the Articles of Confederation, and on the failure of the government under those articles, the recall was omitted from the new plan of government, though not without some opposition.

Since 1908, Oregon, California, Arizona, Colorado and Nevada, have adopted the judicial recall. Three things are significant in a study of the recall in these states:

- (1) It has introduced bad practices in procuring names for the recall petitions.
- (2) The recall elections have failed to interest a representative portion of the people.
- (3) It has introduced party politics into the question.

I shall consider these three points briefly.

(1) Allen H. Eaton, in his book, "The Oregon System," says that the attempted recall of Judge Coke, in Oregon, failed because of the lack of funds to procure enough signatures to the petition. Fred W. Catlett, in the Annals of the American Academy, says:

"As it actually worked, petitions are placed in the hands of many irresponsible persons, who indiscriminately solicit signatures on the streets and in the office buildings, ignorant in the great majority of cases, not only of the voting qualifications of the signer, but also of the genuineness of the name and signature."

(2) When Judge Weller was recalled in California, a case where the enthusiasm was at white heat, the total vote was less than 50% of the qualified list of voters, and he was recalled by a vote of less than one-fourth of the qualified voters. This means one of two things; the voters were not interested in the question, or they failed to vote because they found it impossible to make a rational decision.

(3) Mr. Gilbertson, a secretary of the New York Short Ballot League, says, in the Annals of the American Academy, that politics have been the leading issue in every case of the recall that has been tried.

## AN INSTRUMENT OF SOCIALISM

The Socialist party has already incorporated the recall of judges into their national platform. In the words of Mr. Debs' paper, "The Appeal to Reason," it is "the means whereby the people will be enabled to inaugurate Socialism." The same publication, before the notorious McNamara trial, said,

"Under the provisions of the recall amendment, the judges of the Supreme Court of California can be retired. These are men who will decide the fate of the kidnapped workers. Don't you see what it means, comrades, to have in the hands of an intelligent, militant, working class, the political power to recall the present capitalist judges, and put on the bench our own men? Was there ever such an opportunity for effective work? No; not since Socialism first raised its crimson banner on the shores of Morgan's country."

A news item, taken from the "Duluth Labor World" of August 8th last, illustrates the same point:

"The Socialists' local here has called to its aid the entire Socialist party of the state and nation. The first to respond is the Appeal to Reason, with its over one-half million circulation, pledging itself without reserve, to continue in the recall fight, until Judge McHendrie is swept from the bench and Bob Uhlich freed from jail. A special representative of the Appeal is now in Trinidad."

That these things should arise was inevitable; that they have come up is but proof of the correctness of my thesis. Are we, in Minnesota, willing that such methods of soliciting be introduced? Are we willing that our judges should be recalled by one-fourth of the voters? Are we willing to have the Socialists, or any other political party, make the recall of our judges a national issue? Are we willing that political papers in other states, should pledge themselves to sweep our judges from the bench? If the experience of other states it to be taken as a criterion, the man who casts his vote in favor of this measure, must answer each of these questions in the affirmative.

## THE OPINIONS OF COMPETENT OBSERVERS ARE OPPOSED TO THE RECALL OF JUDGES

Opinions on such a question are only of value, when those who give them have had experience in governmental matters. So far as I have been able to find, no man of national prominence has come out squarely in favor of the recall of judges. I have already referred to the opinion of Woodrow Wilson, the great leader of the majority party, as well as to Senator Root the leading figure of the minority party. Mr. Borah, the famous progressive Senator from Idaho, says: "It is my deliberate and uncompromising opinion that without a free, untrammelled, independent judiciary, popular government, the government of the people, by the people, and for the people, would be a delusion, a taunting, tormenting delusion."

Space will allow the quoting of but one other man, the venerable Archbishop Ireland of Minnesota: "No greater peril to the institutions of democracy, to the permanency of social order, could well be imagined, than the legalizing of the recall of the judiciary."

### CONCLUSION

The conclusion of the matter may be stated briefly: (1) The recall of judges is a radical change in our past policy: (2) Such a change is not desirable; (a) Because it is unfair to the judges; (b) Because it will make our laws ineffective; (c) Because it will have a devastating effect on the rights of the people; (d) Because it cannot remedy any existing defects; (e) Because it has failed where it has been tried; (f) Because the opinion of capable and experienced observers is opposed to the recall of judges.

Men of Minnesota before you cast your votes in favor of this measure, *think on these things.*

HARVEY S. HOSHOUR.

**ARGUMENT BY ARTHUR O. LEE****Of the Madison High School****Madison, Minnesota**

A determined and widespread attack is being made upon the old and established order of things political. It is asserted that we have outgrown our constitution; that government is not sufficiently direct and responsive; that our courts are usurping legislative powers; that they are abusing their high offices in the interests of special privilege, and that justice is being delayed.

The popular unrest that has arisen has received its proportions, not so much from the nature of the conditions, calculated to produce it as from the contagion produced among the impressionable populace by the Socialists and the so-called progressives, who, with their radical ideas of democracy, are traversing the states of our nation, fascinating and enchaining the imagination of the people with a hue and cry about "popular government." The idea of "direct government." "popular control" and the rest of the catch phrases of the propaganda of so-called progressivism are alluring to the average everyday citizen who has neither the time, the inclination nor the capacity to make more than a superficial analysis of what it means and embodies.

The recall epidemic has reached Minnesota, and a constitutional amendment is up for approval or rejection, as the voters of this state see fit, providing for the recall of all public officials, elective and appointive. This includes judges. It is urged by the "progressives" who brought the proposal into prominence that we need more direct and responsive government, and that in view of the abuses in our judiciary the people should exercise a direct restraint upon the actions of the judges. In short, the underlying purpose is to control, by the arbitrary exercise of the popular will at recall elections, the acts and tenure of public officials, including the judiciary.

Those who advocate the recall attempt to justify the adoption of such a proposal by citing cases of delayed justice, drawn out litigations and usurpation of legislative functions by the judiciary.

### RECALL, NO REMEDY

As to delayed justice, long litigations and technical imperfections in our judicial system, no one can consistently claim that the exercise of the recall would tend to ameliorate these conditions. In fact, it was not originally proposed in order to meet these difficulties. However, it is claimed that we need to exercise a check upon judges who frequently usurp powers, not properly theirs, to declare laws unconstitutional. This, with the argument for a direct democracy, is advanced as a principal reason why the state of Minnesota should incorporate into its constitution the provision for the recall of public officials, including judges.

It is claimed that the courts have overstepped their authority by assuming to declare laws unconstitutional. But what is the limit of the authority of a court in a case where a law is seen in fact to be void and unconstitutional? American courts, since the beginning, have claimed this duty as a proper function under our constitutional system. Professor Thayer of Harvard, in his constitutional discussions, proves that when the judiciary declares an act repugnant to the organic law it is acting in its proper sphere. In fact this function of the judiciary has become an essential feature of our governmental system. This, then, is not usurpation, much less does it constitute a ground for adopting the recall.

When the exponents of the recall, in trying to justify their proposal, attempt to show that the judges in the good state of Minnesota are corrupt and inefficient, they miserably fail to present an argument. The judiciary of Minnesota has always presented and gives assurance of presenting to its citizens a class of the most honorable and patriotic-spirited men in the profession. Our courts thus far have been above reproach and the criticism directed against their honesty and integrity stands unsubstantiated.

### "A RETROGRESSIVE STEP"

There is not one consistent reason why Minnesota should make the recall a part of the organic law of the state. It is not a constructive step. It is reactionary and retrogressive, a step back to the dark ages of government.

Analyzed to its logical conclusion the adoption of the recall means that our representative form of government is to be



substituted by a direct or an unlimited democracy. No proposition could strike more directly at the heart of representative government. We are told that representative government, which is the one great political bequest from the growing development of the progressive nations of the world, has failed. We are urged in the name of "progress" to adopt the instruments of socialism, including the recall, in order that our government shall become more direct and responsive. But direct democracy is nothing new. It existed in cultured Athens and in civilized Rome. It prevailed in bloody France. The history of these nations is an instructive memory. In them direct government by the numerical majority failed. In them the ideal theory was shattered. And they had the initiative, the referendum and the recall democracy.

Ostracism in Athens operated on the same principle as does the recall. There is no essential difference between the form of those old time governments that have failed and the form now proposed. Those who uphold the recall argue that times have changed, that conditions are different and that what applied to those past nations could present no lesson to us. But, while we admit that great changes have crept over our civilization, we emphatically deny that fundamental principles and governmental axioms have materially changed. Human nature is the same to-day as it was in Greece and France. Conditions change, ingrained principles and human nature endure.

#### DESTROYS OUR FORM OF GOVERNMENT

Do men realize that by instituting a direct vote on the political and economic questions confronting the judiciary in our complex American life they are casting the established idea of representative government on the rubbish heap and taking from the same rubbish heap the discarded and cast-off principle of direct and unlimited democracy? Why should we disregard historical illustration when the political history of the world shows that where pure democracy has failed representative government has succeeded on its ruins? The men who framed our splendid constitution considered the different forms of government, including direct democracy, and decided in favor of representative government, which, under our constitutional system, has become the model of the world.

Then why should we change our form of government? Are we justified in bequeathing to posterity a system of government inferior to that which we have inherited and hold in

sacred trust? When conditions do not and cannot warrant a radical change, have we the moral right to undo in a single stroke the finished product of 500 years of Anglo-Saxon development of the idea of representative government?

Now, let us test the proposition of popular recall in the light of a few fundamental principles. There are certain inalienable rights which inhere in free government and which are recognized in all constitutions. Among these rights there is none more important than this—that no citizen shall be deprived of his liberty or property except by the judgment of the law and after a trial before an independent and impartial tribunal. This is the keystone of the arch. The majority of the legal voters cannot constitute itself such tribunal. If it does, there is no sure or stable protection for the rights of any individual or of any minority.

#### ESTABLISHES A TYRANNY OF MAJORITIES

Most common among the class of cases that come up before the law are those in which one of the parties is in fact, if not in name, the people themselves or the temporarily popular majority. It is generally contended in these cases that some fundamental right of the individual or of the minority is being violated. In such cases how is the independence of the tribunal which is dependent upon one of the contracting parties to be maintained? Take a common case. A popular majority, through the legislatures elected by it, enacts a statute requiring railroads to carry passengers for 2 cents a mile, or say, 2 cents for 10 miles. In the test case that comes before the court the railroad claims that the act robs it of its property. The court after hearing and study of the facts, sustains this claim. being dissatisfied with the decision, the popular majority recalls the judges who gave the decision and elects judges who will reverse the decision. Which is the determining power? Is it not the popular majority which has constituted itself the court in its own case?

Let us examine the recall in the light of another fundamental principle. When the same power which enacts a law also decides whether the particular case comes within that law, we call it a despotism. There is no separation of powers and functions. On the other hand, in a free government one body makes the law, while another body decides whether the particular case comes within the law. Thus the citizen is protected, because the legislative and judicial departments are kept sep-

arate. Now, if the popular majority not only makes the law, but also decides whether a given case falls within it, then the legislative and judicial powers are united. The government then ceases to be free. It is a despotism, the despotic tyranny of popular majorities.

#### DESTROYS JUDICIAL FUNCTIONS AND PROMOTES SOCIALISM

Not only is the judicial recall wrong in principle, but its effect would be to destroy the independence of the judiciary and, in the last analysis, to destroy the functions of the judiciary itself. The real progressive tendency during the last half century has been to build up an independent, untrammelled judiciary, recognizing no master, catering to no party or faction and administering justice according to law. But the recall proposition is a direct blow at this progressive development of an independent judiciary.

Basing their argument on the assumption that the judge is an agent or servant of the people, the opposition reach the conclusion that the people have the privilege of recalling their agent when he fails to satisfy the popular majority. The fallacy in the argument is in the assumption that the judge is an agent of the people. He is not an "agent" in any sense of the word. The peculiar character of the judicial office makes it imperative that he exercise his functions impartially, recognizing no constituency whatever, except, as Marshall said, "his conscience and his God." To make the judge dependent upon the public in a case in which the public is a party is to make the judge dependent upon the will of one of the parties upon whose claim he is to pass judgment. No sane man would be willing to have judgment passed upon him under such circumstances. It is precisely this state of affairs which it is the main object of the Socialists to bring about. They would have the majority pass statutes confiscating private property and, by the judicial recall, allow the same majority to coerce the courts into allowing such statutes to be enforced. They would eliminate private property by eliminating the present power of the courts to protect it.

## IT DEBASES JUDICIAL STANDARDS

The effect of the recall upon the personnel and character of the judiciary would be anything but salutary. By the very nature of things the recall will, and necessarily must, lower the judicial standard. Claiming that the impeachment process is too cumbersome, those who advocate the recall urge that the people should be given the power to remove inefficient or corrupt judges and elect better judges. But the feasibility of this is questionable. What constitutes inefficiency or incompetency? Can you expect a defeated litigant to judge judicial capacity fairly? Is it rational to attempt to determine the legal and constitutional correctness of a judgment by popular vote? Would it not be considered irrational to have the competency of a physician passed upon by popular vote? The electorate, especially in a case of a supreme judge, would be uninformed concerning the character of a certain judge charged by a few with incompetency. How, except by an extended campaign of education costing thousands of dollars, which corporations and special interests only could afford, could the character of a judge be determined? Then what reason is there to suppose that the electorate will do better concerning the selection of the second judge? Remember that the same power which created the bad judge in the first place is creating the next one. Is that body, to which the demagogues subtly refer as the "people" infallible?

Consider the question of corruption charged against a judge. Is it justice to have his honesty determined upon by popular vote after a heated campaign in which stump orators and demagogues have vied with one another in presenting trumped-up charges and exaggerated statements villifying the character of a judge? How will the judge single-handedly combat these agitators and attend to his judicial duties at the same time?

The indignity and disrespect to which our judges will be made subject under the threat and operation of the recall will work disaster on the personnel of our judiciary. What successful lawyer will leave his practice to hold an uncertain and discredited office? What class of judges will such a state of affairs tend to produce? Does it stand to reason that the threat of recall, hanging over the head of a judge like a sword of Damocles, will make him a better judge? Will men who possess true judicial caliber consent to being coddled into accepting an office whose tenure is controlled by fluctuating popular majorities?

### JUDICIARY MUST BE INDEPENDENT

Hamilton, Madison and Marshall said that the complete independence of the judiciary was absolutely essential under our form of government. In order to perform its high function the judiciary must be independent of the legislative power no less than of the power of popular majorities. To fuse the judicial and legislative functions is to destroy that separateness which was intended to exist between the three departments of government. To make the judge the tool of temporary popular majority, compelling him upon threat of recall to obey every changing whim and caprice of public opinion, is to make him, not the exponent of what the law is, but of what the people, for the time being, think they want it to be. Under such a regime we shall have a government of men, not a government of laws.

But the insidious and undermining influence of the recall does not end here. The duty of the judiciary is to protect constitutional safeguards, to secure the rights of individuals and minorities, however small. A judge, held in jeopardy by threat of arbitrary recall, cannot by the very nature of things exercise this function independently, fearlessly or impartially. He has got to look to the wishes of the faction which has made possible his election. If he disregards their mandates, this faction will, by employing the recall, proceed to replace the inflexible judge with a pliant reed, dependent upon their commands. When such a state of affairs comes to exist, as it unavoidably must under the recall, the people of Minnesota, must expect the nullification of constitutional protection through the destruction of the independence of the judiciary.

By constitutional safeguards we mean those liberties and established rights which inhere in free government. The first ten Amendments embody these rights almost in their entirety. They are written into the fundamental law of our land and are the distinguishing feature of our constitution written as they are in the shape of definite constitutional provisions insuring to every citizen the right of life, liberty, property and human happiness. These limitations upon the governing power have made our government the scientific basis of the constitutions of the world. These are the limitations which by reason of the recall agitation are being seriously threatened at the present time. The citizen who really understands that the adoption of the recall will directly, through the destruction of the independence of the judiciary, and indirectly, through the

nullification of constitutional safeguards, work against the basic principles of true government, will never be found placing his mark of approval opposite the proposed amendment.

#### THOROUGHLY IMPRACTICABLE

But there are further objections to this boasted cure-all, the popular recall. Its impracticability alone must prohibit it from ever becoming a workable instrument. The expense of getting petitions signed, of conducting a campaign of education regarding the qualifications of a certain judge and the outlay connected with recall election must necessarily be immoderately great, especially so in the case of a supreme court judge. The middle class, which usually bears the brunt of such burdens, will not be able to exercise the use of the recall. Rather, you will find it will be the rich, influential litigants defeated in court trials, corporation-owned and controlled presses, special privilege interests and other self-serving elements, that will have the means and the influences to bring about the recall of a judge who dares to act without consulting their wishes.

If there ever was such a thing as bribery and corruption we shall have it in the judiciary if the tenure of that body is to be controlled by those who are financially the most powerful and influential. A campaign of slander, misrepresentation and vilification can be carried against a judge by powerful interests and the retention of a fair, impartial judge will be next to an impossibility. The recall is not an instrument designed to be employed by the forces of democracy. It is, rather, an instrument whereby plutocracy and wealth, hiding behind the protection of the recall, can perpetrate crimes darker than any which ever stained the history of the judiciary.

#### CONCLUSION

Voters of Minnesota, this is the recall and such its meaning. If you vote for the recall amendment you have got to take all that goes with it. Remember that the recall is not a panacea for the technical imperfection in our judiciary. Remember that it means the overthrowing of representative government and the substitution for it of direct and unlimited democracy. Remember that it means the destruction of the independence of our judiciary and of the judicial department itself. Remember that, through the destruction of the independence of the judi-

ciary, it means the nullification of constitutional safeguards, thus establishing socialism, menacing every right of property and of liberty which you now cherish, menacing even your very existence. Remember that it is impracticable and unworkable, a two-edged sword, destructive of the judiciary and destructive of the interests of the people. Remember that it is fundamentally and totally reactionary, subversive of all true government and repugnant to all the fundamental principles for which civilized man since the signing of Magna Charta has fought.

ARTHUR O. LEE.



Extract from Annual Address of President Wm. H. Taft of the American Bar Association, delivered at Washington, D. C., October 20, 1914.

"This Association four years ago appointed a Special Committee to Oppose the Judicial Recall, and that committee has done great work. Its present chairman, Mr. Rome G. Brown, of the Minneapolis Bar, has delivered effective addresses to many State Bar Associations throughout the country, and has encouraged legislative opposition in many states to the embodiment of these heresies in statutes. The report of the committee shows that there has been a distinct falling off in the support of these fundamentally unwise and dangerous proposals. They were incorporated in the platform of the Progressive party, and the leader of that party at one time felt called upon to declare that they were the rock upon which it was founded and were essential to the efficacy of every other one of the reforms which the platform of the party set forth and advocated. It would appear that the party which once fathered these proposals now finds that instead of being the rock on which it is founded, it is, to change the metaphor, the rock on which it founders. Certainly it seems wise to its leaders to ignore this part of their original propaganda, an indication that it has ceased to be vote-getting and indeed has become a burden to any party that assumes to press it. I do not mean to say that the denunciation of the courts has not continued to be a favorite theme in the mouths of a certain class of orators, but the originators of this preposterous nostrum of judicial recall are engaged in scaling it down into changes in our judicial system which are not to be commended but which are much less radical and objectionable. In New York the Progressive party has abandoned its platform altogether and confined its appeal to the voters to a declaration against boss rule; while its candidate for Governor has rejected the recall. In Massachusetts, too, such methods of reforming the judiciary are not made the subject of discussion at all by the Progressive party, and its evident effort is to induce the voters to ignore them. The demon Rum has there been substituted as the object of attack, instead of "the divine right of fossilized judges," and of this change, whatever our views of prohibition, we can express our unqualified approval. The only state in which the recall of judicial decisions has been adopted is the State of Colorado, and the present condition of that state with reference to governmental authority is not such as to commend those who have formulated its policies in the recent past."



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# The Lawlessness of the Judicial Recall

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Annual Address, Delivered Before the South Dakota State Bar  
Association in the Hall of the House of Representatives,  
at Pierre, January 14, 1915

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By Rome G. Brown,  
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*Gentlemen of the South Dakota Bar:*

## THE PREVALENCE OF LAWLESSNESS

The prosperity and stability of our Constitutional Democracy are at present menaced by an unusual spirit of lawlessness prevailing among its people. The international policy of this, the best governed country on the face of the earth, stands today before the whole world as a protest against lawlessness between nations. It has demonstrated itself to be the greatest representative and exponent of international morality, and thereby has rightly become the only possible arbiter between the belligerent nations engaged in the present European war. Nevertheless, within, this Nation is suffering from a dangerous and growing disregard of law, which has already become so widespread as to threaten disruption and even revolution.

This lawless spirit of the American public manifests itself in various forms. Were it not for the more deep-rooted and dangerous phase of lawlessness which I shall today emphasize, it

would be sufficient to dwell upon the fact that defiance of authority under the law has in this country, in various localities within the past few years, brought about conditions which are in essence those of civil warfare. It is certainly a fact of disturbing significance to the citizen who cherishes our democratic form of government, that, at the present time, a large area of one of the United States is under marshal law, due to the fact that Federal and State troops are required to suppress and hold in check a local rebellion against governmental authority.

Another phase of lawlessness, of ill omen to our institutions, are the outbreaks frequently occurring in various communities when, without judge or jury, the execution of the law is taken out of the hands of the proper officers and violations of the law are perpetrated under the guise of observing the "unwritten law," or through lynching of persons suspected of crime.

But it is not to the lawless acts of the mob to which I wish to call your attention. While they are a part of and encouraged by a current tendency to disregard law, those are lawless outbreaks, due largely to temporary or local conditions. The prevalent lawlessness of which I shall speak is that which is not confined to a particular time or a particular place. It is not that from which springs either the crime of this or that individual, or the violence of mobs. Neither does it comprehend the plots of conspirators against penal codes working out by unlawful subterfuge their own selfish interests.

The lawlessness of which I shall speak is that growing disregard by a large part of the citizenship of the Nation, common to a greater or less extent to all classes, of the principles of the fundamental law which are the basis of our system of government.

#### THE LAWLESSNESS OF LEGISLATORS

There is, for instance, an increasing tendency on the part of legislators, Federal and State, in the United States to disregard or to attempt to circumvent constitutional prohibitions.

They are too easily led to mistake change for progress. A visionary scheme of legislation, based upon the theory of some doctrinaire who ignores the established limitations of legislative power, is formulated over night into a Bill, ostensibly having for its object the promotion of health, morals and general welfare. Its wording appears, perhaps, as might a chapter upon ethics. It might be a practical statute in a visionary Utopia, but its practicability and enforceability under our system of government must be measured by the rule of the Constitution.

In the United States, if the express constitutional limits of the legislative power shall be passed, it is the function of the courts so to declare; and their declaration is final. When the question of the constitutionality of a statute comes before the courts, the presumption is, that the legislature has acted within its powers and that, so far as it had discretion, it has exercised such discretion reasonably. The contrary must appear, even beyond reasonable doubt, before the courts will nullify the action of the legislature. The correct theory of our constitutional government assumes that, in framing a statute, the legislative body will carefully and deliberately do its utmost to guard against any unconstitutional legislation and that, if it transpires that any such legislation has been enacted, it was through a conscientiously mistaken view of the scope and effect of the existing constitutional provisions.

Such theory is not, however, applied in practice. The tendency of the modern legislator is toward an almost reckless disregard of constitutional limitations. He seems to evince a willingness, not only to destroy personal and property rights up to the very limits marked by constitutional prohibitions, but to pass those limitations, regardless of their scope. If they happen to present an obstacle to the accomplishment of his particular temporary or local purpose, he shirks the responsibility of gauging legislation by the rule of the Constitution, and puts that responsibility upon the courts. American legislators seem to



regard constitutional limitations, not as safeguards to be cherished and protected by law-makers and by every citizen, but as fortifications of an enemy inviting the attack of the citizenship. From such an attitude follows the hostile attitude toward the Judiciary, because the courts were established for the purpose, and have exercised the function, of maintaining these established safeguards against all attacks arising from whatever source and from whatever motive.

This lawless tendency on the part of legislators to shirk their duty and to disregard their constitutional powers of legislation was properly rebuked by the Federal Supreme Court, when it said (*Knorrville v. Water Company*, 212 U. S. 1, 18) :

“The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the diasaster which follows.”

The legislative lawlessness just referred to is but the result and expression of a larger and growing hostility to constitutional restraint. The essential features of our system of government are its balances, checks and restraints upon those having the powers and duties of its administration. It is a government of restraints. It is a form of government, the peculiar and characteristic merit and efficacy of which arises from its established and enforcible restraints. Hostile attacks, for the purpose either directly or indirectly of eliminating such restraints, are, therefore, destructive of our constitutional form of government,

#### A GOVERNMENT BY LAW

The permanence of the constitutional republic under which we live, and of which your great State is a component part, has been vouchsafed to you, to us, to every citizen of

this Nation, so long as it shall be maintained, as it was established and intended to be maintained, a government by law as distinguished from a mere government by majorities—in other words, a government by law as distinguished from a mere government by men.

When these United States adopted their Federal Constitution, there was organized a system of government for the people of this the then new world, which was the product of ages of experience in governmental organization. It was a revolt from the oppression of the arbitrary caprice of sovereign control. The object of the makers of our Constitution was, so far as human foresight could make it possible, to rid the people of this Republic of the shackles upon the individual rights of liberty and of property from which the citizenship of other governments, both monarchical and democratic, had suffered. Their object was, not only to create a “more perfect Union,” but to establish definite rules of conduct which, in the administration of the government and in its relations with its citizens, should mark the limits of interference, through legislation or other means, by the governing power with the established individual rights of the governed.

As against the oppression of unlimited, or insufficiently limited, exercise of the arbitrary will of a monarchical sovereign, it established a government by and for the people. As against the oppression of any temporary controlling faction, through the arbitrary whim or passion of temporary majorities, it protected the individual and minorities by limitations upon the legislative power, expressly protective of those human rights of the pursuit of happiness, of personal liberty and of private property, the preservation of which has been the primary object of every democratic system of government. Our government, with its co-ordinate, but separate, departments and with its express written limitations upon the encroachments of the sovereign power upon the rights of the citizen, was intended as a protest and as a protection against the tyrannies, both of monarchy and

of democracy, which had characterized other governments in the world's history.

The makers of our Constitution had in mind the evils and disasters suffered under former unlimited democracies, quite as much as they had in mind the oppressive interference of the government of George III, or that of any other King or despot. Ours was to be a government, not of one man through hereditary control, nor of a few men, nor, without restraint, of a majority of men who might, through enfranchisement, control the electorate. Arbitrariness of control was to be eliminated. It was not to be either a government by man, nor a government by men. It was intended to be, and its success has followed from the fact that it was established, a government by law.

The power of every department of this government must be measured, restricted and enforced by the rule, not of arbitrary caprice, but of the law. In the establishment of a written paramount and fundamental law, in the form of the Federal Constitution, lies the distinguishing feature of our government by law. Except as it shall be amended in accordance with an enlightened and seasoned public opinion, pronounced only after mature deliberation by the legislative bodies of both the Nation and of the several States, it establishes the rule, not only for the Federal Government, but for the government of each of the States, by which the powers of the executive, of the legislative and of the judicial branches of the government shall be measured. No executive, legislative or judicial officer of a State, or of the Nation, can be qualified to enter upon the duties of his office except by a solemn oath to respect that fundamental law. Great powers may be invested in the executive officers of a State or of the Nation, but they can never be made to transcend in their scope the express limitations of the written paramount law. The Congress and the several State Legislatures have wide discretion in the enactment of statutory law; but all statutes, Federal and State, must be gauged by the rule of the Constitution.

## NECESSITY OF THE JUDICIAL FUNCTION

Constitutional limitations, as any other rules of conduct, however clearly and definitely expressed, are intended as something more than mere precepts for the theorist. They were intended to be controlling and to have efficacy by practical enforcement. Safeguards against any danger are futile without adequate provision for their protection against attack. A rule of conduct, expressed in definite but in general terms, becomes a "mere scrap of paper" unless some means be established to apply and to enforce that rule in particular cases. Constitutional protection of life, liberty and property, however strongly and definitely expressed, would be meaningless without an established and recognized power of its construction and enforcement in particular instances.

It was in order to give just such meaning and efficacy to our constitutional safeguards that the Judicial Department of our governmental system with its peculiar function was established. The legislative branch was to enact the statutory law. The executive branch was to carry it into effect. But the Judiciary was to apply to statutes the rule of the Constitution and by that rule measure, construe and limit the enforceability of statutory law. It was through the Judicial Department that was to be afforded the necessary protection, maintenance and enforcement of constitutional safeguards to individual life, liberty and property.

## RESTRAINTS BY "SCRAPS OF PAPER"

Why is it that the nations of Europe are today involved in the most bloody and devastating war known in history? Treaties, solemnly and deliberately made, expressed in terms the rules of international conduct which, as a part of the fundamental international law, were binding between the nations of the world. They comprised restraints expressly defining rights and obligations, and limiting powers of interference, between

nations. Such restraints upon interference with recognized fundamental rights are intended to protect against any instance of temporary or local encroachment inspired by the selfishness, greed or caprice of any party to the compact. In terms they were sufficient for that purpose, but they were lacking practical efficacy. And why? Why was it that these fundamental restraints could, at the arbitrary caprice of one or more nations, become mere "scraps of paper"? It was for the very reason that there was lacking an established power of their construction and application to particular instances. There was lacking the necessary judicial function to measure a particular act by the fundamental rule and to adjudicate its consistency or its repugnance to the established general rules of conduct. It was such absence of a judicial power of interference, of construction and of application of the general rules to the particular case which, in these international matters, has made those rules of duty and of restraint useless as international safeguards against individual or national caprice and passion. They were futile to prevent outbreaks of international lawlessness.

The efficacy of the national constitutional restraints, established under our form of government, to protect against oppression through the caprice or passion of individuals and of majorities, was safe-guarded alone by the establishment of the judicial function, as now administered by our courts.

#### THE LAWLESS HOSTILITY TO RESTRAINT

It follows that hostility to these restraints and a disposition to violate or disregard constitutional limitations, or to circumvent or to eliminate them by direct or indirect methods, are but a form of lawlessness, because they originate in a desire to eliminate the characteristically protective features of our form of government. We have seen that the efficacy of our constitutional democracy, as established under our Federal Constitu-

tion, lies, not merely in the written and definite safeguards to the life, liberty and property of individuals, but in the establishment of an effective means of their observation and enforcement, without which they would be mere precepts, subject to the passion and caprice of majorities.

Changes in the fundamental law which do not meet sufficient approval to insure modification therein by the established lawful process of amendment, are sought to be affected through violations by indirection—violations promoted by a lawless attitude toward our institutions encouraging unlawful subterfuges subversive of the fundamental law. Therefore, we find that those impatient of lawful restraint make their first attack upon the institution which was established to protect and enforce the restraints intended by constitutional safeguards. They attack first that institution which is the keystone of our constitutional government—the Judicial Department. They seek, by various and devious methods, to wrest from the Judiciary of the States and of the Nation the constitutional function of measuring legislation by the rule of the Constitution and, by judicial review, of distinguishing between statutory provisions which are constitutionally enforceable and those which are not.

#### THE JUDICIAL RECALL A LAWLESS PROPOSITION.

It goes without saying that a judge must be independent of control or retaliation by the makers of a statute, in order that his construction, and judgment as to the validity thereof, may protect litigants in the courts from confiscation by statute of their personal and property rights. The established judicial function cannot be effectively performed by a judge who is subject to the arbitrary recall of the electors of his State or District. His freedom of judgment once taken away, his independence once destroyed, he becomes the mere agent or spokesman of temporary majorities, even of the lawless tendency which may prevail at any particular period or in any particular locality. Making him subject to the arbitrary recall leaves to him

a judicial function only in name. Its essence and reality are gone. At the same time disappears the independence, not only of the Bench of which he is a part, but of the entire Judicial Department. The Judiciary becomes merely a servile tool of popular passion and of the arbitrary caprice of temporary and local majorities, instead of a means of protection and enforcement, for the benefit of the entire citizenship, of the safeguards established to prevent the oppression of popular caprice and passion. The Recall of Judges is a lawless proposition, because it is a direct attack upon the independence of the judge, and, therefore, an indirect attack upon the judicial function and upon the constitutional safeguards intended to be protected by its exercise.

The Recall of Judicial Decisions is a still more lawless proposition, because it is more directly subversive of the judicial function and, therefore, still more destructive of constitutional safeguards. The Decision Recall deprives the Judicial Department directly of its judicial function and turns over to a temporary and local majority, whose influence has compelled the enactment of a statute, also the power to compel its enforcement regardless of constitutional considerations. It gives to such majority the power to annul, as to any particular case, the protective provisions of the Constitution. Worse than that, it allows an arbitrary, temporary and perhaps local suspension of constitutional protection and allows the electorate arbitrarily to enforce a constitutional safeguard at one time and place as applied to a litigated case, and, as to another similar case, to withhold the protection of the same safeguard which, under the Constitution, was intended to be applied and enforced equally as to all. The Decision Recall destroys all equality, consistency and efficacy in the enforcement of constitutional protection.

#### THE COLORADO EXAMPLE

The best illustration of the real significance of the Decision Recall is the Colorado example.



Under the recent Colorado amendment a supreme court decision declaring unconstitutional any State statute may be made ineffective by a majority of the votes cast by State electors at a referendum election held to pass upon the decision complained of. If the decision applies to certain city, or city and county, charter provisions, the decision may be recalled by a majority of the votes cast by electors of the municipality in question at a referendum election held to pass upon such decision. Thus, under the Judicial Decision Recall in Colorado, if a city charter provision is found to have the effect to take private property without compensation, or to impair the obligation of contracts, even in a case in which the city itself is party, and the court for that reason declares the charter provision unenforceable, nevertheless, a majority of those voting at a city election called to pass upon such decision may, arbitrarily, decide the question as to whether the decision shall be enforced or not. This means that those citizens who attend such referendum election may, by a majority vote of those present, decide whether in the particular case in question the constitutional safeguards protecting rights of property or of contract shall or shall not be enforced; and this, too, either in favor of or against the city itself. A city might decide one way one day and another way another day with reference to the same provision. One city might decide one way and at the same time another city another way with reference to the same provision.

Now, what do you think of the wisdom or sanity of these pseudo-reformers who pretend to view such processes of juggling with constitutional safeguards as merely "progressive" methods, as merely "a new method of constitutional amendment by popular vote"?

It is obvious that in Colorado there is established a local option with reference to the suspension or application of constitutional safeguards. The actual result there is a *reductio ad absurdum* of the decision recall argument.

## THE SOURCES OF LAWLESSNESS

The lawless and subversive character of the Judicial Recall is demonstrated by the fact that its advocates are avowedly hostile to constitutional restraint. They are hostile to the very restraints which are the peculiarly protective features of our form of government. They would break down the protection which is intended by the fundamental law. These advocates comprise many and different classes of people, but in every instance the Judicial Recall advocate is an exponent of lawlessness and of the most pernicious sort of lawlessness by which the stability of our free institutions is threatened. This is true, whether he appears in the form of an Ex-President, chafing not only under political restraint, but under any restraint, and particularly under constitutional restraint, or whether it be the Anarchist, speaking on the street corner under the red flag, villifying the Nation's magistrates, inciting contempt for the Constitution and exhorting his hearers to smash the government by a defiance of its courts and of its magistrates, and, if necessary, by the bombs of the dynamiter. In varying degrees they all belong to the same class, for their hands are all against government by law and, at the same time that they inveigh against the courts, they urge, as the most promising means of destruction of our Constitution and its safeguards, the establishment of the Judicial Recall.

I do not intend to denominate every Judicial Recall advocate either a Socialist or an Anarchist, nor to brand him in every instance as an avowed enemy of our constitutional government. It is a fact, however, that every advocate of the Judicial Recall is necessarily, no matter how conscientious he may be, an ally of lawlessness against our fundamental law. He stands as supporter and promoter of that which is the most efficient instrument of the disruption of our constitutional government by law.

## THE INSTRUMENT OF SOCIALISM

It is difficult to define a Socialist. The political and social creeds of Socialism are varying and sometimes contradictory. There are Socialists and Socialists. There are many who would repudiate Socialism as such but who, nevertheless, are, in effect, among its promoters. There are certain dogmas of Socialism which are destructive of government, and among them are certain doctrines which are palpably repugnant to our constitutional form of government.

Socialism preaches that the ownership and control of property by individuals, admitting of accumulations by thrift and industry, is an institution developed in derogation of the rights of the people as a whole. Rights of private property are rights which have been "stolen" from the people. Again, it is a part of the Socialist creed, that the power and authority exercised under our government, by which the rights of private property are protected against encroachment by the individual or by the sovereign people itself, are also in derogation of the rights of the people as a whole. To Socialism this government "for the people and by the people" means that any majority at any time and place may work its will unrestrained, and may confiscate for the use of the people as a whole any or all private property rights. The protective function of the courts, to determine whether a statute invades private property rights, whether it is confiscatory and unconstitutional, is, to Socialism, a function which has been "usurped" or "stolen" by the courts from the people as a whole.

Therefore, the Socialist argues, the right of private property and the established power of its protection under the law are a right and a power which neither any citizen nor the entire citizenship is under any obligation to respect. The first object of Socialism is to destroy the established rights of liberty and property under the law. The means of such destruction, which he advocates, is the destruction of the present judicial function

of enforcing the constitutional safeguards established for the protection of those rights.

The forces of Socialism, therefore, are directed against our Constitution, and its essentially protective features. It is significant, therefore, that the modern advocacy of the Judicial Recall measures first sprang from Socialism. The Socialist-Labor Party was the first political party in America to demand the Recall. The Judicial Recall measures were first put forward by the Socialists as the best possible instruments of accomplishing the destruction of protection to private property rights and, therefore, of the property rights themselves. The leading organ of Socialism in this country—"The Appeal to (T) Reason" refers to the Judicial Recall as:

"The means whereby the people will be enabled to inaugurate Socialism, and after that is done they may secure democracy in industry."

Contempt for the Constitution and for the Judiciary constitutes the main teachings of Socialism. The platform of the National Socialist Party, beside the Recall plank, urges the abolition of the powers of the courts to declare statutes unconstitutional and refers to that power as one which has been "usurped." Then, referring to these measures—that is the Recall and the destruction of the judicial function—the same platform says that:

"they are but a preparation of the workers to seize the whole powers of government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance."

Keep these facts in mind when you are told by others, who know or ought to know better, that the powers exercised by our courts have been "arrogated" to or "usurped" by the courts themselves; and when you are urged to wrest from the courts their chief functions and to turn over to majorities the direct control of judges or the direct adjudication of constitutional questions.

Can it be disputed that, however respectful of our institutions and however conscientious in his beliefs, any citizen, who advocates or votes for the Judicial Recall measures, thereby becomes, in effect, an ally of Socialism?

#### THE SOCIALIST CONTEMPT OF OUR CONSTITUTION

It is most significant, that the advocacy of Judicial Recall is almost invariably accompanied by expressions of derision and even of contempt for the institutions of our government which have been established in its administration under the Constitution. The Judicial Recall advocate, when forced to an analysis of his position, is compelled to admit that the measures for which he stands are repugnant to constitutional protection. He has to admit that his position involves an attack upon our form of government. He can no longer pose as one who supports our Constitution. He is forced to base his proposal upon the claim that our Constitution is vitally defective and that it is defective in respect of the very protective provisions, to establish which was the primary purpose of its adoption. He must demonstrate as his first premise that we should not have established a government by law, but that should have been merely a government by men, without restraint upon the legislative power of the people. Further, he must demonstrate that there should be no established means of enforcing constitutional safeguards, and that, therefore, the Judiciary should be shorn of its power, and that judges and their judgments should be subjected to the control of popular majorities. The day is past when the judicial recall advocate can satisfy his audiences by dwelling upon instances of unjust or unequal administration of law, which must occur under any system of government administered by fallible human beings, and then jump to the conclusion that the Recall is a sure panacea for all such evils.

The American people have reached that stage of enlightenment upon this question that they now generally recognize the

fact that the Judicial Recall is repugnant to the essential features of our form of government and that its adoption means, in essence, a change in our form of government, that it means the turning over to temporary and local majorities the power to determine whether, in any particular case, a statute shall be allowed to work out a confiscation of private property or a deprivation of the individual rights of liberty. The larger part of the American citizenship, when confronted with this choice between our present system and that which is proposed by the Judicial Recall, has shrunk before the incontrovertible fact that the proposed change is retrogressive, that it eliminates those safeguards which are necessary against the oppression and, indeed, tyranny of unrestrained arbitrary popular control. It is recognized that the Judicial Recall proposes to establish the very uncertainties, inequalities and, therefore, the opportunities for oppression of the individual and of minorities in respect of their personal and property rights, against which it was the wise and deliberate purpose of the makers of our Constitution to safeguard.

If any of you are still inclined to favor these subversive measures, let me further remind you of the company in which you will find yourselves.

#### THE SOCIALIST VIEW OF THE FEDERAL CONSTITUTION—PEARSON'S MAGAZINE

The Socialist view of our Federal Constitution may be assumed to be authentically presented by a recognized Socialist who contributes to a certain American monthly magazine, which, before its period of decadence, had some elements of respectability. Some of you may remember, even in these days of its obscurity, a monthly periodical known as "Pearson's Magazine." Within the past three years this magazine has been exploiting in its columns such unwarranted and dastardly attacks upon our Federal Constitution that it has thereby sufficiently dem-

onstrated its right to the boast once flaunted upon its cover page that it prints stuff "that others dare not print." Even in this day of sensation mongers it is probably true that no other publication would have had the effrontery to violate truth, to shock all sense of decency, to the extent that this magazine has done. It ridicules the term "patriot fathers" as applied to the framers of our Constitution. It brands them as "grafters" who initiated and carried through a change in our system of government and framed and established a constitution, upon a plan which "was never meant to bring about rule by the people," but which was adroitly put together and the adoption of which was surreptitiously and deceitfully procured all for the sole purpose "to enhance the value of their own property holdings and to tighten and increase the burden of the shackles which theretofore existed upon the liberty of the common people."

The Constitution of the United States, it says, was made for the people "in the same sense that sheep shears are made for sheep. The gentlemen who made the Constitution had sheep to shear." This is the view presented by a 1913 American Journal, and in support of its propositions it indulges in a mess of misinformation and of garbled and distorted citations from authorities.

To such an extent has this periodical joined the forces of the Socialist propaganda that the reprints of its articles, reviling the Federal Constitution and its makers and expounders, have become religious tracts and textbooks of enormous circulation in Socialist circles. The unfortunate feature of this Socialist propaganda is, that these vitrolic pamphlets, copyrighted, sold, and distributed by the publishers of Pearson's Magazine, have had, and are still having, a poisonous effect upon the minds of many editors, magazine writers, newspaper men, and citizens generally, who are misled by these instruments of error.



## THE CLIMAX OF SOCIALIST DEFAMATION

Not content with reviling the Constitution and its makers, the Socialist goes to the extreme of defaming the signers of the Declaration of Independence and the instrument itself which declared the separation of this Nation from the tyranny of monarchy. In a "patriotic edition" of the Socialist organ, "Age of Reason," published at Dallas, Tex.—its last July number—it is declared that the patriots of the Revolution, when they returned home from their battles—

"found that the thieves of America had written this document to fool the workers with. \* \* \* They were then compelled to go to this robber-creditor class (who had written the beautiful document above referred to) for supplies to make a crop. These liberty-loving thieves were also the lawmakers—the makers of the laws they had passed to imprison men for debt. \* \* \* Could the demons of hell hatch a more damnable plot against the working class? \* \* \* Just a few men have the right to make the laws, hence they make the laws so that just a few men can own the property. \* \* \* They framed this document so that it would arouse the ire of the working class and cause them to rise up and drive the British out of this country, and give to this bunch of American capitalists the right to make the laws so that they could take the place of the English capitalists and rob the working class."

And more of the same twaddle, *ad nauseam*.

## "EVERYBODY'S" SHOULD BE NOBODY'S

Another unscrupulous and despicable contributor presented some time ago in another magazine ("Everybody's"—it should be nobody's) a venomous attack upon the judiciary in which he traduced individual judges, maligned the courts, and calumniated the entire judicial department by false statements, by subtle innuendos, which undoubtedly brought conviction to the general mass of unthinking readers, but which to discriminating persons brought only the reaction of an intense shock to their sense of decency.

## ALLIES OF SOCIALISM

The repudiation by the American Electorate of these once so-called progressive measures seems to be assured through an apparently returning sanity of the citizen voter. The epidemic of radicalism, which, up to a few weeks ago, seemed increasingly current, is subsiding. Even the press-bureau of Oyster Bay now reflects a silence upon this question, which is more eloquent than words ever spoken. Apparently we are having now more and more the expression of deliberate thought, in place of the hue and cry of those restless and impatient of restraint. Views are now discredited, which before seemed to have preponderant influence.

It was only a short time ago that an Ex-President of this country, while on a journey among the South American countries, showed himself so much out of touch with the growing enlightenment of this Nation upon this question that he indulged in muckraking our Constitution and our Judicial system before the citizens of the South American Republics, whose governments are modeled upon our own. He placed our constitutional system of government before them as defective and held up the prime function of our courts as performed only through usurpation of judicial power.

Roosevelt allied himself with the Socialists when he stated, at Buenos Ayres, that for more than thirty years the courts of this country have exercised their powers with "inexcusable and reckless wantonness on behalf of privilege" and against the interests of the people, and when he stated that the established judicial function of enforcing constitutional safeguards was a function which had been "arrogated" to and "usurped" by the courts themselves. He was then, in effect, preaching Socialism, for this is precisely the ground and manner of attack made by the Socialists upon the government which they would destroy. What is more significant, the instruments of destruction which they advocate as the most efficient to accomplish this end are

precisely the same Judicial-Recall measures that have been urged by Roosevelt.

Claiming himself to have invented or discovered the Decision Recall, which is more directly destructive of constitutional government than even the Recall of Judges, he ignores or suppresses the fact that "My Remedy" was discredited and cast out by the Australian Constitutional Convention fifteen years ago. At the same time that the enlightened and progressive people of an entire continent adopted a Constitution modeled upon that of this country; by unanimous vote of their representatives in their Constitutional Convention, they rejected the Judicial Decision Recall as repugnant to, indeed as automatically destructive of, a constitutional form of government.

#### A JUDICIAL PERVERT

The extent to which some prominent citizens, otherwise apparently of mental balance, have become, for a time, obsessed with the Judicial Recall fallacy, only shows the seductive and all-pervading influence of the enticing arguments sometimes made in its support. Every community and every profession and calling display individual instances of eccentricity and of adherence to vagaries. A Harvard Professor of great learning, indeed a world-wide authority in history, has defended the Judicial-Decision Recall in a thesis in support of "Government by Men." Dean Lewis, of the Pennsylvania State University Law School, has been the chief active apologist of the legal profession for the Decision-Recall as formerly advocated by Roosevelt.

It remained for one of the oldest States in the Union, with an enlightened and conservative citizenship and with a State Judiciary and Bar of the highest standing, to have the Chief Justice of its own Supreme Court shock the sensibilities of its citizens and those of the entire Nation by persistent attacks upon the fundamental law under which we live. No Socialist

doctrinaire has made more malignant and unjustifiable attacks upon our Constitution and upon its makers and its expounders than those made by Chief Justice Walter Clark, of the Supreme Court of North Carolina, in his Cooper Union address at New York last January. He views the making of our Constitution and the administration of our government under it as the work of "exploiters." All the evils, governmental, industrial and social, from which our people have suffered, are the results of oppression of an exploiting government upon its "exploited" citizens.

The Constitutional Convention at Philadelphia in 1787 assembled, he says, only "for the nominal purpose" of creating better business and commercial relations between the States and to supply the need of a stronger Union. In default of the trust imposed upon them, and using the pressing necessities only as a pretext for their selfish ends, the framers of our Constitution shaped that instrument "with sublime audacity," as he says, with the very intention and with the very result that the "reactionary" "exploiters" of an oppressed people then took and have since maintained control of our Government. As "the allied vested interests" then intentionally made the Federal Constitution an instrument of oppression and injustice, so they next, by various means, persuaded the different States to its adoption. The same "vested interests" afterwards procured, to be stolen or "usurped" from the people, the power, never intended for the courts, of the judiciary to declare invalid and unenforceable statutes repugnant to the express prohibitions of the Constitution. This was a further grasp of power by the designing "exploiters" in control. More than that, the courts of the land, he asserts, have become, by usurpation, the arbitrary, capricious, and oppressive rulers of the people. The fourteenth amendment "means anything and everything that the judges see fit." The decisions of the Federal Supreme Court have been subtle perversions of the law and the reasonings of those decisions are mere instances of "sardonic irony" and of "adding in-

sult to injury."

This chief justice reechoes the Socialist cry when he says, referring to the discontent prevailing among certain classes of citizens:

"The progressive and humanitarian measures necessary to the betterment of their condition are almost invariably negatived by the courts, whose sympathies are with the propertied class and vested rights."

Translated, this means that our courts have enforced the express constitutional safeguards against property confiscation, despite the lawless attacks of Socialism and of those who, like Clark, are the allies of Socialism.

To overturn this "government by judges"—a government which is "very largely a plutocracy"—he would leave the adjudication of such questions to a referendum ballot through the recall of judicial decisions or would deprive the courts entirely of their power of declaring statutes unconstitutional.

If the holding up, before the people of our Nation, of our Constitution and our American form of government to the derision and contempt of its citizens is promotive of better citizenship, then "better citizenship" means the citizenship of Socialism; it means the rule of the dynamiter. Justice Clark's address would make an orthodox chapter in the creed of the socialists, or a consistent editorial in their organ, "The Appeal to Reason," or in the anarchist organ, "Mother Earth." You will note that Chief Justice Clark shows more familiarity and more sympathy with the propaganda of socialism than he does with the Federal Constitution or with the decisions of the Federal Supreme Court.

Judge Clark's assaults upon our Constitution and upon the Judiciary of the Nation, and his advocacy of the Judicial Recall, have been and are, as I know, offensive to the Press, to the Bench, to the Bar and to the citizens of his State. They are, also a shock to the sense of decency of the entire Nation. I have referred to the views of this muckraker of our institutions to

illustrate again the malignant and hostile sources from which spring the advocacy of Judicial Recall. The deliberate presentation of the Judicial Recall measures is necessarily based upon the claim that our Constitution and our system of government is essentially wrong and that, therefore, it must be subjected to drastic change.

The object sought to be accomplished by the Judicial Recall is lawless indulgence in disregard of constitutional restraint. It is lawless because it is violative and subversive of the fundamental law and of the protection intended thereby to be afforded to the individual rights of liberty and of property. The instrument proposed for the accomplishment of this lawless object is the Judicial Recall. The Judicial Recall is, therefore, an instrument conceived in lawlessness for the accomplishment of fundamentally lawless purposes.

#### THE JUDICIAL FUNCTION THE BULWARK OF LIBERTY

I shall not now attempt to answer in detail the claim, which is the basis of attacks upon the judicial function, that the power of the courts to pass upon the constitutionality of statutes is a power which has been "usurped" from the people. This peculiar judicial function has been confirmed by precedent after precedent until it has become a part of our constitutional system of government. It is recognized by masters of the Science of Government as the very keystone of our constitutional system and as the very bulwark of liberty. In fact, it was so regarded and so intended by the makers of our Constitution, as was shown by Chief Justice Marshall in the early case of *Marbury v. Madison* (1 Cranch 137) in which, Chancellor Kent declares,

"the power and duty of the Judiciary to disregard an unconstitutional Act of Congress or of any state legislature were declared in an argument approaching to the precision and certainty of a mathematical demonstration."

It was on the strength of this view of the judicial function that the States were urged to and consented to the adoption of

the Constitution. The First Congress, under the new constitutional government, confirmed this view by providing for a review by the Federal Supreme Court of the decisions of the State courts wherein was drawn the question of the validity of State statutes or any exercise of State authority on the ground of repugnance to the Constitution, treaties or laws of the United States. This statute was passed immediately upon the adoption of the Constitution and fourteen years before Marshall's demonstration that the question of the repugnance of a statute to constitutional prohibitions is a judicial question, the determination of which belongs under the Constitution to the courts.

The claim of usurpation is simply an expression of lawless hostility to fundamental law.

The establishment and maintenance of this judicial function vouchsafe in the only way possible, the effectiveness of the protection promised by the Constitution to the liberty of person and of property.

It was this establishment of effective protection, not merely theoretical protection, of the individual and of the minority against the arbitrary caprice and oppression of local or temporary majorities, that has made stability, efficiency, security of life, liberty, and property of persons and of minorities, prosperity and enlightenment of its citizens, the characteristic features of the Government of this, the greatest Republic in the world's history. It is these scientific, practical, and effective features of our system of government which have made it the model for all modern governmental reorganizations and have made our Constitution and the government administered under it the objects of admiration and even marvel of the masters of the science of government. Gladstone characterized our Constitution as expounded by Marshall,

“the most wonderful work ever struck off at a given time by the brain and purpose of man.”



Bryce, the greatest modern student and authority upon constitutional government, terms ours, as

“the first true Federal State founded on a complete and scientific basis.”

Lord Brougham, referring to our Constitution, said :

“The power of the judiciary to prevent either the State legislature or Congress from overstepping the limits of the Constitution is the very greatest refinement in social quality to which any set of circumstances has ever given rise, or to which any age has ever given birth.”

The English historian, John Morley, referring to the opinion of the world's students of government and their attitude toward our Constitution, said :

“Everybody praises the American Constitution these days.”

Lord Salisbury said, in 1882 :

“I confess I do not often envy the United States, but there is one feature in their institutions which appears to me the subject of the greatest envy—their magnificent institution of a Supreme Court. In the United States, if Parliament passes any measure inconsistent with the Constitution of the country, there exists a court which will negative it at once, and that gives a stability to the institutions of the country which, under the system of vague and mysterious promises here, we look for in vain.”

If Lord Salisbury says this of the English system, what reply would he make to one who holds up to you as models above our own the judicial systems not only of England but of France and Germany? The French and German are systems still more “of vague and mysterious promises,” for the very reason that they are based to a still greater extent upon a disregard for precedents. A government of law can not exist where the only basis for arriving at the conclusions of fact and of law in a litigated case or in a criminal prosecution, is the mere passing impulse of the triers with reference to what they may deem to be the merits. One might as well commend to us the system of

Mexico. There is a Government, the administration of which is not hampered by any regard for precedents, nor by any regard for a constitution, much less by any regard for constitutional limitations. There is a Government administered without the intervention of any judicial functions, usurped or otherwise. In Mexico they are not bothered with precedents, nor even with any system of promises of protection to life, liberty, and property, either expressly written or vague and mysterious. The condition of Mexico is the logical result of the elimination of constitutional protection and of the debasement of the judicial function. To such a goal would the revilers of our American Constitution and judiciary turn the people of this Nation. Justice, equality, and consistency in the administration of law, protection for the established rights of life, liberty, and property require that all magistrates should act with a proper regard for precedents.

- Shall we replace our present constitutional democracy with a democracy which has no enforceable bill of rights; which has no stable, sure, consistent, or equally administered constitutional protection for the individual as to his life, liberty, or property? Shall we destroy that stability of our institutions which, as Lord Salisbury said, is protected by the exercise of judicial functions as they are established under our Constitution? Shall we, by making the will of the legislature enforceable upon the demand of a popular majority, destroy constitutional protection, and make our system of Government also a mere "system of vague and mysterious promises"?

All this we do as soon as we adopt the lawless proposition to subject judges or judicial judgments to a referendum election.









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# **THE LAWYER AS AMICUS CURIAE**

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ADDRESS DELIVERED TO THE  
GRADUATING CLASS OF

*The John Marshall Law School*

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By ROME G. BROWN, Esq.,

CHAIRMAN COMMITTEE OF THE AMERICAN BAR ASSOCIATION  
TO OPPOSE JUDICIAL RECALL

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CHICAGO  
JUNE 22, 1915





# The Lawyer as Amicus Curiae

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It is my purpose, at this time, to make a somewhat unusual application of the term which has been set down as part of my subject. In the earlier English courts of justice, as today in both English and American courts, the lawyer was, in a sense, a part of the court itself. He was an officer of the court and, as such, had certain duties and privileges beyond those arising from his position of advocate in a pending case. If, as to the law or as to the facts involved in the issues then before the court, he, happening to be present, detected some misapprehension on the part of the presiding magistrate, it was his privilege to make suggestions, not as a partisan, but as "*amicus curiae*"—a friend of the court. This function is extended today to the granting of the privilege to lawyers, not of record in the case, of participating in argument and of filing extensive briefs, upon questions both of fact and of law.

This peculiar function emphasizes the fact, that the duties and privileges of the lawyer extend beyond his mere capacity as paid representative of the litigant whose retainer he has received. At all times he owes to the courts, as the administrators of the law, a higher professional obligation. With the judge, he is the administrator of the law. With him, as with the court, the law is a science, to be applied consistently and equitably to particular cases. Of course, we are speaking of the lawyer who has the highest sense of his professional opportunities and obligations. We are speaking of the one who recognizes the profession of the law as a science. The distinction is too often overlooked, and especially by young lawyers, that the profession of the law has for its object the study and development of a science, and that it is not the mere practice of a craft. To some extent the lawyer must partake of the nature of a craftsman. He must be ready to work out the particular problems presented by those who engage his services. Loyalty and efficiency to those whom he represents

are among his first obligations. For his skill and effort in their behalf he is entitled to receive proper remuneration. But the lawyer who views his calling as merely a craft which promises only to yield to him financial return, has a most inadequate, indeed ignoble, view of his profession. And let me say, right here, that, if any of you have chosen this course with the main view of the monetary returns which you may think the profession of the law promises, you have made a mistake. If you view the time and expense of your preparation as an investment merely for future cash returns, you are not only reasonably sure of disappointment but, what is more important, you are liable, even if your sordid hopes are realized, to disappoint the expectations of those who better appreciate the opportunities which, from now on, are open to you.

As to each of you: Are you to limit your field of professional work to that of a mere craftsman, working at so much per job, or at so much per day? Or are you also to devote your learning and your expert skill, as they develop in you through hard study and hard experience, to the science of law itself and to questions which are greater than those involved between one litigant and another? Are you also to be "a friend of the court," and in a broader sense than was he who, in olden time, helped to guide the judicial magistrate to a correct decision in a particular case? Will you be prepared and ready, from love of science of the law, unselfishly to devote time and effort to needed reforms in the administration of justice and to combat lawlessness, in whatever form it may appear? Only thus will you fulfill the highest functions of the lawyer and become truly successful and honorable in the profession which you have chosen.

#### THE FIELD OF THE LAWYER'S ACTIVITY

I have already referred to the distinction between the law as a science, to which its exponents give some of their time and effort in unselfish devotion, and the law as a mere craft, adherence to which is sought and maintained only as a means of livelihood or of financial gain. The latter view confines its thought to the day.

It may bring riches, but riches, not with honor,—much less with fame. Fame, which riches cannot buy, comes only from love of duty, from unselfish devotion to the science or art of the devotee. What if Michael Angelo had viewed the exercise of his artistic talents as the working of a mere craft? It was the inspiration arising from his unselfish devotion to religious art, which made the fame of his work extend beyond the limit of the few years of his life. So with Harvey, and with others famous in the science of surgery and of medicine. So with Edwards, Channing, and Brooks, in the profession of the ministry. None of you, perhaps may become a Marshall, a Kent or a Lincoln, a Sumner or an Edmunds, a Choate, a Root or a Taft; but you may, through emulation of these and of other famous lawyers of the American Bar, set high the goal of your ambitions. Devotion to your profession and to the law will surely bring honor and the more precious richness of unselfish accomplishment.

The lawyer has many opportunities and duties outside of those connected with his purely professional practice. His duty involves not only that which is incumbent upon every citizen, but he is peculiarly the guardian of the law. He owes it to his profession from the time he first enters the bar to make the law, its precepts and its practice, worthy of respect. There are those in high places, who recklessly heap censure upon the courts of this country and upon the lawyers as a class. One ex-president scoffs at the profession of the law and pretends to regard lawyers as obstacles to progress. If progress means change for the mere sake of change, and an adoption of suicidal specifics under the guise of remedial reforms, such as are some of those prescribed by this reactionary progressive, his pretended scorn of lawyers is a compliment to our profession. We are sometimes best graced by the enemies we have made. Quite in contrast with this political acrobat, whose genius of energy and whose effrontery are unparalleled in history, is that sturdy, logical and convincing professor of law, graduated also from the executive chair of the nation, whose consistent, judicial fairness and sanity have turned his defeat at the polls into the victory of having established himself as America's most eminent citizen. He is the American leader of that

profession as to which the sneering voice from the jungle, a year or so ago, said:

"No people have permanently amounted to anything whose only public leaders were clerks, politicians, and *lawyers*."

This from the self-styled naturalist whose great achievement made him a second Burbank when he turned the Bull Moose into a goat.

As against which sneer Mr. Moorfield Storey, the Nestor of the New England bar, recalls the names of Hamilton, the Adamses, Jefferson, Marshall, Lincoln, Sumner, Cleveland, and Taft, in this country. He shows that the members of our profession have ever been the champions and defenders of liberty, recalling the names of Cicero and Mazzini, of Grotius and Barneveldt, of Turgot, Danton, Thiers and Gambetta, Coke, Hampden, and Burke, of Grattan and O'Connell. And Mr. Storey replies:

"No people have ever permanently amounted to anything among whose leaders great lawyers were *not* conspicuous, and among whom respect for the law was not a controlling force." (Reform of Legal Procedure, page 11).

The Chief Justice of the Supreme Court of North Carolina has persistently allied himself with the socialists, through his notorious achievement of having become a muckracker of our Constitution and of the American judiciary. He preaches the socialist doctrine, that the established function of the courts, to declare invalid statutes which contravene constitutional limitations, is a function which has been "usurped" by the courts themselves and he characterizes decisions of the Federal Supreme Court as "subtle perversions of the law" and the reasoning of those decisions as mere instances of "sardonic irony" and of "adding insult to injury." We need only to read the decision in *Marbury v. Madison*, enunciated by that great jurist whose name honors your law school, to find an answer, full and convincing, to all the vituperative attacks upon our institutions in which this modern Quixote of judicial reform has indulged himself. Justice Clark's addresses and published writings would make orthodox chapters in the creed of the socialists, or consistent editorials in their organ "The Appeal to Reason," or in the anarchist organ "Mother Earth." Occupying a

high judicial position, he is in fact lending himself to the promotion of lawlessness in its worst form.

The field, then, of the lawyer's activity is unlimited. He has every duty of the citizen, and special duties besides. It is not, however, of the lawyer as a general promoter of reforms that I wish to speak. I would call attention today to two phases of the higher professional work of the lawyer to which his attention is made necessary at the present time. The one is constructive, involving the advocacy and promotion of really progressive reforms; and the other involves the repression of reforms, so-called, but which are, in fact, the expression of a prevalent disposition to lawlessness.

#### REFORMS IN THE ADMINISTRATION OF JUSTICE

"Of all the questions that are before the American people," says Professor Taft, "I regard no one as more important than this, to-wit: The improvement of the administration of justice."

There is a crying need for constructive reforms, not only in the organization of the courts, federal and state, but in legal procedure. "The law's delay" is not a fiction, although its evils are too much exaggerated. Traditional technicalities have become obstacles to the administration of justice. Betterment of conditions has been attained through improved rules of practice, and, in some instances, by legislation affording partial remedies of limited scope. The congestion of the court calendars, however, still continues, and the proper expedition of litigation is prevented. The evils are more radical than can be met by any piecemeal treatment. The best thought of the American bar is today centered upon the solution of remedies for the deplorable situation, which must be met separately in each State. The task presented requires the highest and best talent of our profession. Every member of the bar should cooperate to the fullest extent possible in the formulation and adoption of measures necessary to perfect the organization of the courts and to accomplish the needed reforms in legal procedure. It is a work set before the lawyers, and that means you, to participate in the efforts which

have been started to bring about these reforms. It is a work which is remunerative only in the satisfaction of the results obtained; but in its participation are involved the highest professional duty and privilege of the lawyer. I commend your earnest attention to these constructive reforms.

#### THE REPRESSION OF LAWLESSNESS

The highest professional work of a lawyer is not, however, confined to constructive, progressive reforms. He must combat lawlessness. I do not here refer to defiance or disregard of the law in the ordinary sense of those terms. Through the propaganda of unrest which has been prevalent, more than at any other time, during the past few years, and which still persists, the mental attitude of the American electorate toward our fundamental law has become distorted. Public opinion, that great arbiter, has at times and at places, been made to assume a form which in reality is merely a disguise. The sober, deliberate conviction of the citizenship has, at certain times and in certain localities, been repressed by the temporary intensity and activity of disciples of error. Public opinion has been over-awed by the very force of reiteration of fallacies, until fallacies are taken as axioms. Vital truths have been lost, for the time being, in the maze of misleading doctrines forcefully and dogmatically enunciated; and the temporary or local numerical majority is mistaken as expressing what is in fact public opinion. But, as President Lowell of Harvard, ("Public Opinion and Popular Government," pages 13-14) says:

"Public opinion is not strictly the opinion of the numerical majority, and no form of its expression measures the mere majority, for individual views are always to some extent weighed as well as counted. Without attempting to consider how the weight attaching to intensity and intelligence can be accurately gauged, it is enough for our purpose to point out that when we speak of the opinion of a majority we mean, not the numerical, but the effective majority.

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Public opinion to be worthy of the name, to be the proper motive force in a democracy, must be really public; and popular government is based upon the assumption of a public opinion of that kind. In order that it may be public, a majority is not enough, and unanimity is not required, but the opinion must be such that while the minority may not share it, they feel bound, by conviction, not by fear, to accept it; and if democracy is complete, the submission of the minority must be given ungrudgingly."

#### THE LAWLESSNESS OF SOCIALISM

Using the term in its proper sense, as applied to the ultimate ruling force in a democracy, public opinion in America repudiates socialism; and this is true, without exception as to any locality, despite the fact that here and there at times the majority have voted in favor of socialist candidates or of socialist measures. The main features of socialism are features of lawlessness; and, when properly weighed, no American community has ever really approved the lawlessness of socialism. It is, however, the most active and persistent of the dangers which threaten our constitutional form of government. Socialism contemplates a reorganization of our government which would involve the elimination of all constitutional safeguards to life, liberty and property. It would establish a government by the whim and caprice of majorities, unrestrained and unchecked by any fundamental law. It would replace our government of law with a government of men. Despairing of such change in our form of government by any direct or deliberate process, the socialist seeks to accomplish his ultimate object by insidious and gradual encroachments upon the bulwarks of our form of government. He would remove, one by one, the barriers which have been so carefully constructed and maintained to protect the person and property of the citizen against arbitrary oppression or confiscation by majority vote. He preaches openly that the right of private property is a right which has been "stolen" or "usurped" from the people. He even maligns the Constitution and the Declaration of Independence, as drafted by "robbers," who, by these instruments, established the institution



of private property for the purpose of indulging their own selfish greed and for the destruction of the rights of the common people. The right thus "stolen," the socialist teaches, no citizen has any duty to respect, for, as he asserts, confiscation of private property rights by the arbitrary will of the majority, if such will could be enforced, would involve merely a return of property to those from whom it had been wrongfully taken.

Recognizing the fact that the restraints upon his contemplated repudiation of the rights of property and of persons are, under our form of government, safeguarded by the judiciary, through the function of the judiciary to declare confiscatory statutes unconstitutional and unenforcible, and further recognizing the fact that this judicial function can only be effectually performed by a judiciary which is independent and which is kept free from the arbitrary control of the temporary passion and caprice of majorities, the socialist becomes the proposer and advocate, first and last, of those measures which are intended to undermine the independence of the judiciary and thereby to eliminate those protective restraints upon legislation which are the characteristic features and merits of our fundamental law.

#### THE JUDICIAL RECALL

It is not necessary today to enter upon a detailed argument to show that the Judicial Recall is essentially an instrument of socialism. It is so declared by the socialists in their leading organ, where it is designated as "the means by which we shall inaugurate socialism;" and so in the Socialist-Labor platform, where the Judicial Recall first appeared in any form in this country as a political doctrine. It is a measure springing from socialism, advocated only by socialists, and, manifestly, the only instrument by which the socialist doctrine, of subjecting life, liberty and property to the arbitrary and unrestrained whim of majorities, can be effectively established.

This sort of socialism is lawlessness. The Judicial Recall, whether in the form of the recall of judges or of the recall of judicial decisions, is an expression of lawlessness. These meas-

ures are lawless, because their avowed purpose is antagonistic to our fundamental law; and not only that, but because their purpose is to eliminate the very basis of our form of constitutional government and of our American social system, which rest, as stated by the Federal Supreme Court, "upon the sanctity of private property." The Judicial Recall is lawless because it seeks to eliminate by indirection all the protective features of our Constitution. It is lawless, therefore, because it is destructive of our form of government.

Can any lawyer, therefore, whose duty it is to repress lawlessness, more effectually aid in the maintenance of law than by opposing this insidious and dangerous fallacy? I have said that the Judicial Recall is advocated only by socialists. Many prominent citizens have lent their influence to this subversive doctrine who would repudiate the title of "socialist." Let each label himself as he will,—"naturalist-explorer," "Chief Justice of a State Supreme Court," "professor of history," "dean" of a law-school, "new-nationalist," or by any other name, they are, each and all, nevertheless, socialists. They are more socialist than the socialists themselves, for many of them lend to the socialist cause the force of a prestige, from past or present rank, as no avowed socialist could do.

#### NOT A DEAD ISSUE

The Judicial Recall is by no means as yet a dead issue. Its opponents believe that it has become discredited throughout the country, and this even in States where it has been adopted in some form. It is significant, however, that the recall of judges has become a part of the constitutions of seven States, and that also in Colorado the constitution provides for the recall of judicial decisions. At the last fall elections Kansas adopted the proposal of its legislature of 1913, to incorporate into its state constitution a provision for the recall of judges. The defeat at the same time of a similar proposal, submitted in Minnesota, is encouraging, especially in connection with the fact that the Minnesota legislature of 1915 refused to re-submit such a proposal. Reports

from the different States indicate that, with the exception of Kansas, there has been no progress in Judicial Recall during the past year, and that the votes in the different legislatures, where it has been discussed, show a diminished support.

The opportunity for a young lawyer to start right in the work of his profession is shown by the campaign against the Judicial Recall which was made last fall in Minnesota, when the constitutional recall amendment lacked about 40,000 votes of the number required for its passage. The campaign pamphlet there used against the proposed amendment consisted of two prize arguments against the recall, the one by a senior student in the law school of the University of Minnesota, and the other by a student of one of the high schools of Minnesota. These arguments were of such excellence that it was not deemed necessary to distribute any other literature. They brought home to the citizens of the State the views which two of their intelligent sons had taken after careful study of the subject.

#### THE DECISION RECALL IN COLORADO

You will be interested, I am sure, in the practical demonstration which is made in Colorado of the absurdity of the judicial decision recall. The constitutional amendment which provides for the recall of judicial decisions allows certain cities, by a majority vote of their citizens, to recall a decision, even of the State Supreme Court, which shall declare unconstitutional a provision of a city charter. A certain city charter provision, therefore, if found to have the effect, in any particular case, to confiscate private property, or to have any other unconstitutional effect, may be declared unenforcible by a decision of the courts and that decision may be reversed and the charter provision retained as enforcible, by a majority vote of the electorate of the city in question. A city may decide one way today and another way tomorrow in regard to the same question. And as to the same or similar charter provision, one city may decide one way, and at the same time another city another way. All consistency in the administration of the law is thus destroyed.

A recent example is significant: Denver is one of the cities permitted by the Judicial Recall amendment to recall, by a majority vote, a Supreme Court decision involving the enforcibility of a city charter provision as against the state constitution. That constitution provides for prohibition throughout the State. The "Wets" are in a majority in the city of Denver. In the contest which is now on between the "Wets" and "Drys" of Denver, the Supreme Court of the State will probably hold the constitutional state-wide prohibition clause to apply to Denver; whereupon the "Wets," within the city will invoke the decision recall and, by submitting such decision to the electors of the city, will doubtless bring about its reversal. Many prohibitionists in Colorado have heretofore strenuously advocated the judicial-decision recall as adopted in 1912. They now see that it may result in at least a partial failure in Colorado of the prohibition movement; and, further, that local option has been established, not only in respect of the liquor question, but also in respect of the question of the enforcibility of the decisions of the highest court of the State.

#### POSSIBILITIES OF REVIVAL

The persistence of this fallacy presents many possibilities of its revival, in one form or another. Within the past year the American Judicature Society, which has its headquarters and active officers in this city, has in the course of its work "to promote the efficient administration of justice," issued a bulletin which treats of proposed reforms in the organization of the courts. It proposes the abolition of the elective system of judges, and then, as a sop to the lingering predilection in favor of Judicial Recall, it is proposed to add to the present method of retirement of judges through impeachment, not only the right of removal, upon charges, made and adjudicated, by the State Legislature and by a Judicial Council, but also the retirement by a fourth method. By this fourth method it is proposed to submit to the electorate at certain intervals of time the question "shall \_\_\_\_\_ (naming the judge), be continued in office?" If the vote is in the affirmative, the judge remains in office. If in the negative, then the judge

goes out of office and the vacancy is filled by appointment as in the case of original selection. It is argued that this last proposition is not in reality a Judicial Recall and that it merely preserves the present periodic power of retirement, existing under the elective system, at the same time that it eliminates many of the objectionable features of that system. That such a measure should be proposed by any society whose active members comprise well known lawyers, is significant of the extent to which the Judicial Recall fallacy has taken hold. It shows that Judicial Recall is dead only in spots. This proposition concedes too much to socialism. It prescribes a poison in modified regular doses for the purpose of curing those who have become addicted in a dangerous degree to a deadly narcotic. It is a remedial tapering off, a sort of conciliatory concession, under the guise of a remedy, to a vicious appetite which had temporarily seized upon the electorate. Logically it is impossible: and we should see to it that the American Bar is not caught in a proposition to remedy the organization of the courts by the disorganization of constitutional government involved in any measure which gives over to the electorate the arbitrary power, without a hearing, to retire a judge during the term of office for which he has been elected or appointed.

There are many other opportunities for the exercise of your ingenuity and enterprise, your skill and your learning, in behalf of the public welfare. Enter upon your work with the determination to be in the broadest sense of the term a "friend of the court." Help to promote constructive reforms in the administration of justice. Keep in mind that progress means change, but that change does not necessarily denote progress. Do not shrink from innovations, but examine and deliberate over proposals which are presented under the guise of remedies or reforms, from whatever source they come. Distinguish between those which are really remedial and those which are, when analyzed, subversive. As antagonists of lawlessness, mark those measures for your fiercest and most persistent attack, which involve, either directly or indirectly, the elimination of the constitutional restraints and limitations which have made our Government, as it is termed by Bryce, "the first true Federal state founded on a complete and scientific basis."





# **The Socialist Menace to Constitutional Government**

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**Annual Address, Delivered before the Louisiana State Bar Association at Alexandria, La., May 12, 1917**

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**By Rome G. Brown,  
Minneapolis, Minnesota,  
Chairman, American Bar Association  
Committee to Oppose Judicial Recall**





# **The Socialist Menace to Constitutional Government**

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**Address before the Louisiana State Bar Association at Alexandria,  
Louisiana, May 12, 1917.**

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**By Rome G. Brown,  
Minneapolis, Minnesota.**

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**There are two sorts of menace to the stability of our constitutional democracy.**

**One is from without. It lies in the danger of the results of open warfare against this country, invasion by a foreign enemy and the subjection of our citizens and our institutions to the tyranny of a militarist autocracy. To such dangers we have been too little alert. We approve the dignified, and at the same time forceful, declaration of the Congress, on the 6th of April, last, that all the resources of this country shall be used to maintain the rights of our sovereign democratic government, as against the encroachments of European militarism. That declaration of war was a defiant protest against ruthless and uncivilized aggression. It was an expression of the inherent spirit of Americanism which will, at all times and to the full extent necessary, defend itself from the invasion by foreign enemies, either of our territory or of our rights as a free and independent nation of the world. We have ultimately little to fear from the effects of any menace by a foreign enemy, whether such enemy shall at any time appear in the form of Mexican banditti, or of the yellow peril of the Orient, or of Spanish tyranny, or of the yet barbarous and inhuman militarism of the Hun. The threat of any such**

invasion from without makes all true American hearts throb in a unison of response to the call to arms and in consecration of our lives and property to the defense of our government and of civilization.

The most serious menace now threatening our free institutions is that of disruption and revolution from within. It is the menace of those forces which seeks to change our form of government by revolution, but by a revolution effected, not by open, armed revolt,—a revolution, rather, of attitude of mind toward our free institutions and toward the protective features which are peculiar to our constitutional democracy.

It is as to one most grave manifestation of this revolutionary tendency of which I shall speak to-day. I propose to discuss those changes in our institutions which are advocated, and in fact promoted, through the socially and politically revolutionary propaganda of "Socialism."

#### OURS A GOVERNMENT OF INDIVIDUALISM

The social and political theory upon which our Government is based is the very opposite of that of Socialism. Socialism means a direct and pure democracy in government,—a government by mob rule, a subjection of the individual citizen to the whim and caprice of temporary passion, a government without the intervention of courts or of representative, deliberative legislation. It means an obliteration of property rights and of individual liberties and rights, except as the citizen shall *per se* become a silent partner in the fruits, if there be any, of enterprises owned and managed by the State. Under Socialism, prosperity depends, not upon individual ambition, effort and thrift, but, rather, upon the displacement of competition and of the exercise of talent and of effort by the individual, by a subjection of individual talent, and enterprise to the direct control of the State. Individual prosperity and property rights are to be submerged in State control. Likewise in-

dividual, talent, incentive, effort and motive for effort and for thrift, and all their fruits,—all are to be submerged in State control. Property rights and personal rights and liberties are to be lost under the paternalistic and tyrannical sovereign power of the socialistic democracy.

Our Constitution was written as a manifestation of the world's greatest revolt, by a united people, against, not only the tyranny of monarchy but also against the tyranny of democracy. For the very reason that Socialism is radically democratic, it is even more susceptible of tyranny to the individual than any tyranny of monarchy.

The Magna Charta, wrested from King John at Runnymede, was the great protest of the English-speaking world against the tyrannical invasion of the individual rights and liberties of the citizen. Its real force, however, in English jurisprudence, was never adequately felt, until, in the form of the Bill of Rights, it became a part of our Constitution, wherein the enforcement of the individual rights and liberties therein declared was vouchsafed by express limitations upon the legislative power. Our Constitution declared individual property rights and liberties and at the same time safeguarded their maintenance by the fundamental law which was made controlling upon all law-making power of the States and of the Nation. Freedom from unauthorized search or imprisonment, freedom of religion, and, above all, the right to acquire and hold property, and the right of individual liberty in all social and business relations,—the efficient protection of these individual rights was, more than anything else, the purpose, and the accomplishment, of our Constitutional Government.

Of course, where the right of private property exists there must be inequalities of fortune, varying as the diligence, skill, effort and thrift of the individual varies. The socialist would level all inequalities of fortune, simply because he deems that such leveling would conduce to the welfare of the now less prosperous. He would accomplish that object by direct confis-

cation if feasible; otherwise by indirect means. He would ignore, and as soon as possible abolish, all constitutional guaranties by which private property rights are now protected.

In a recent case the United States Supreme Court said:

"No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; \* \* \* Since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either.

"And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect, that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty." <sup>1</sup>

#### THE REVOLUTIONARY AIMS OF SOCIALISM

We are not here directly concerned with the purely social, economic, or religious phases of Socialism. So far as this discussion is concerned, the labor-cost theory of value, propounded by Karl Marx as the basis of the socialistic creed, is immaterial. It would be useless here to follow through the fallacious syllogisms, of which this Marxian theory of value is the first premise, to show the steps of reasoning, or of unreasoning, by which the socialist pretends to draw the conclusion, that it is the right and the duty of every citizen to engage in open

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1. *Coppage vs. Kansas*, 236 U. S. 1, 17-18.

revolution against our present social and governmental system. Suffice it to say, that orthodox Socialism teaches that "value is determined by the socially necessary labor-time that is required to produce an article under the normal conditions of production and with the average degree of skill and intensity prevalent at the time;" that the working people, the "proletariat," produce everything, but that, under "the iron law of wages," their wages are kept at the bare cost of living; that the capitalists receive in the form of rent, interest and profits, the greater part of the values created by the proletariat, and that these surplus values, belonging of right to their producers—that is, the workers,—have been and still are obtained and withheld from the workers through "exploitation" and "robbery"; that capital is being concentrated into the hands of a few, the middle class being rapidly eliminated, and that soon there will be only two classes left, capitalists and laborers, the "robbers" and the "robbed"; that the laborers will become the more numerous class and will eventually seize, by the ballot,—or by violence if necessary,—all political power in the State and all property and industries and, through a common ownership and management of the means of productions, will establish an equitable distribution of values, and thereby abolish not only poverty itself, but all inequalities of fortune, which have been the result of the present property-right system.<sup>2</sup>

The objects, then, of Socialism, are a social revolution and a political revolution.

And how is such political revolution in this country to be brought about? Against what institutions of this government is the attack directed? In what manner is the proposed warfare upon our institutions to be conducted? These are some of the questions which touch the interests of any American citizen, whether he be lawyer or layman, if only he has the slightest regard for his oath to support this government and

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2. "Orthodox Socialism", by James Edward Le Rossignol, pp. 9-12.

the constitution upon which it is founded.

As in the case of most cults, or sects, representing any proposed change or reform, whether it be social, religious, or political, the means by which the changes proposed are to be affected, are not only those which are openly advocated, but are also those which are taught and planned among the most orthodox of the initiated. Socialism, as other cults, has its exoteric, as well as its esoteric, aims and doctrines. And it is in the secret councils of the high priests of the cult, where the real ultimate purpose and intent of the movement are laid bare. The propaganda of Socialism is discreet. It systematically and studiously pretends to advocate a revolution which shall be peaceful in its nature, a revolution by the ballot; while the occasional drift into the open from its secret councils discloses the purpose and threat of open violence, and eventually, of the catastrophe of a bloody, armed strife between the two classes into which it divides all men of the nation,—those who have property, and those who have not.

First, let us consider the publicly avowed objects which socialism has set for itself to accomplish in this country.

#### WHAT SOCIALISM OPENLY PROPOSES

The socialist movement in America has expressed itself in the formation of a national political party; and the 1912 platform of that party asserted, as some of the items of its "program" of action, the following:

The government ownership and management of all means of transportation and communication, and of all large-scale industries, including the immediate acquirement by the government, either municipal, State or Federal, of all grain elevators, stock yards, storage warehouses and other distributing agencies; all land should be taken over by the state either directly or by confiscatory taxation; the adoption of the initiative,

referendum and recall (including judicial recall); the fixing of minimum wage scales in all employments; the abolition of the United States Senate and of the veto power of the president, and allowing a repeal of national laws only by act of Congress or by voters in a majority of the States; the abolition of all federal courts, except the Federal Supreme Court, and the election of all judges for short terms; the abolition of the power "usurped" (as they say) by the Supreme Court of the United States to pass upon the constitutionality of legislative acts; and the revision (presumably upon the Socialist basis) of the Constitution of the United States.

But these drastic changes are only steps to a greater change, for the platform states that all such measures of "relief"

"are but a preparation of the workers to seize the whole powers of Government in order that they may thereby lay hold of the whole system of socialized industry and thus come to their rightful inheritance."

The socialistic platform of 1916 re-affirms the same objects; demands, further, that the Federal Constitution shall be made amendable only by a majority vote of the people; and declares that it is the aim of the socialists to re-organize the life of the nation upon the basis of Socialism. The socialist platform of Minnesota for the year 1912, asserts that it

"Aims to establish the collective and public ownership of the means of production, transportation and distribution, the democratic operation and management of such public enterprises and the remuneration of the workers by the full social value of the product of their labor."

And the same State platform for the year 1916 states as the "ultimate aim of socialism":

"The before mentioned measures are presented by the socialist party for the immediate relief of the workers, but its main efforts are directed to the complete overthrow of the present capitalist order and the establishment of an industrial system based upon the collective ownership and democratic management and control of the sources and machinery of wealth production."



The socialist party of Minneapolis in its city platform for the year 1912, after specific changes proposed, asserted:

“We repeat that it must be distinctly understood that we advocate these remedial measures only as a means to advance the one great end of the Co-operative Commonwealth.”

Socialism, therefore, from its political viewpoint, presents an entirely different aspect from that of the usual political party. The issue between the Democratic party and the Republican party is one of policy in the management of the existing government. It is neither the avowed purpose nor the intention of either of these two political factions to get control of the management of the government for the purpose of changing the form of government from that of a representative and constitutional democracy to an ultra-paternalistic and unconstitutional mob-rule government. The control sought by the Socialist Party is avowedly for the precise purpose of wrecking the present form of Government, and undoing forever all the work which has been accomplished by its founders and by its statesmen and jurists through the more than hundred years of its steady emergence as the greatest and most prosperous of the governments of the world's history.

#### ESOTERIC SOCIALISM

While appealing to the ballot as a means of peaceful overturning of our present form of government, the “ultimate aim of Socialism” is not alone a peaceful revolution by the ballot. When discretion shall permit, it plans resorting to violence. Even while pretending to deny the violent intentions of Socialism, the socialist candidate for the presidency dismisses the subject of violent intentions on the part of the socialist as unreasonable, but solely on the ground of the lack of “advisability” at the present time, of violence and because “the use of dynamite would turn the minds of people against them.” He

says: "Wherever there is a *free ballot* they believe in using it, to the exclusion of bombs and bullets." But, to one who, like the socialist, repudiates the present power and function of the courts to protect individual rights and to prevent class distinctions in legislation, what shall determine the distinction between a ballot that is "free" and one which is not free?

Again, the same socialist spokesman says:

"While they are in a minority they are obeying the laws that the capitalists make, but when the socialists become a majority, they will insist *even with bullets* that the capitalists obey the laws that the socialists make." <sup>3</sup>

And how is this change from ownership and control of private property to common ownership and management under State control to be accomplished? In their public platforms, as to measures of legislation to bring about this change, they make pretensions of provisions for compensation. Socialist representative Berger in the National House of Representatives, introduced a measure for the taking over by the government of certain large business enterprises and making payment therefor by issuing fifty year, two per cent, government bonds for their value,—such compensated value to be computed at their physical reproduction-cost. But this compensation feature is only a gratuitous concession to the "robbers" who have acquired these properties, and, to the socialist, is not based upon any principle of right either in law or in morals. It is like the "reward" offered to the thief for the return of stolen goods "and no question asked." The orthodox socialist urges direct confiscation on the plea that the right of such confiscation is supported by a "higher law" than that which is represented by our constitutional safeguards. Benson says:

"One need quote only the law of self preservation to prove that if any people shall ever become convinced that their lives depend upon the confiscation of the trusts, then such confiscation will be justified. When men reach a certain stage of hunger and wretchedness they pay scant

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3. "The Truth about Socialism", by Allan L. Benson, pp. 22-23.

attention to every law except the higher law which says they have a right to live.

I believe that most socialists twenty years ago, were in favor of confiscation. The trend now is all toward compensation. Not that socialists have changed their minds at all about the equities of the matter. They have not. But they are coming to see that compensation is the easier and quicker way.”<sup>4</sup>

#### THE SOCIALIST VIEW OF THE FEDERAL CONSTITUTION

“Our Dishonest Constitution” is the term applied to our Federal Constitution by America’s representative socialist. In a book which has become a leading one of the socialist propaganda of enmity to our present form of government, under the title “Facts about the ‘Fathers’ ”, referring to the framers of the Constitution, he says:

“Some were grafters. Some were crooks. Some were of mediocre intelligence. Some of extraordinary intelligence. But all were capitalists or the attorneys of the capitalist class.”<sup>5</sup>

Then from Washington, Hamilton and Madison on down through the entire list this muckraker pretends to detail the faults and failings of each with scandal of the most infamous kind ever sprung from the imaginings of the traducers of character. This book is but a reprint of the shameless contributions by this same writer in a monthly periodical of the year before.<sup>6</sup>

In Pearson’s Magazine, August, 1913, the term “Patriot Fathers” as applied to the framers of the Constitution was, by this same author, most indecently held up to ridicule. They are branded as “grafters” who initiated and carried through a change in our system of government and framed and established

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4. “The Truth about Socialism”, by Allan L. Benson; “Essentials of Socialism”, by Ira B. Cross, pp. 102-103.

5. Chap. 2, “Our Dishonest Constitution,” by Allan L. Benson.

6. Pearson’s Magazine, August, 1913, et seq.

a Constitution, upon a plan which "was never meant to bring about rule by the people," but which was adroitly put together and the adoption of which was surreptitiously and deceitfully secured by its framers,—all for the sole purpose "to enhance the value of their own property holdings and to tighten and increase the shackles which theretofore existed upon the liberty of the common people." He holds up to the utmost contempt that instrument for which respect and support are made the essence of the oath of American citizenship. He vilifies the Constitution itself and defames its makers and the very motives of their work in its making, and teaches disloyalty to it, and to the government the stability of which depends upon the enforcement of that Constitution as its fundamental law.

I assert that when the leader of a faction, whether that faction be political or social, and whether it represents 600,000 professed adherents or only 600, becomes the spokesman for such doctrines as these, and whether or no it be in times of peace or in times of war, he has approached, even if he has not passed, the limit which marks the distinction between loyalty and treason. Can a man be viewed in any other wise than as an enemy, an outspoken enemy, of the government under which he lives, who asserts, as does this man Benson, when referring to the workingmen as "victims of the Constitution," that:

"The Constitution of the United States was made for them in the same sense that sheep shears are made for sheep. The gentlemen who made the Constitution had sheep to shear."<sup>7</sup>

And again when he says:

"Common people don't fight well in war time, for a government that they know is neither for them nor was ever intended for them. Nor do common people submit to continuous robbery in times of peace merely because the robbery is committed according to the rules laid down by a government that they know was founded by the rich for the benefit of the rich. Therefore, the common peo-

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7. Pearson's Magazine, August, 1913, p. 151.

ple are taught to hold the Constitution in veneration. If a foreigner wishes to become a citizen of the United States he must swear, among other things, that he believes in the principles laid down in the Constitution. If the people of this country knew the real principles and purposes that underlie our Constitution, they would not permit a foreigner who believed in it to enter the country. They would regard him either as a fool or a fraud.”<sup>8</sup>

All this from the man who stood as the chosen national representative of the socialist movement in this country during the political campaign of 1916. This is the author of whom Eugene V. Debs, also once socialist candidate for president, has said:

“No one is better qualified to write a popular exposition of the socialist philosophy and to make clear to the average reader the real meaning of Socialism.”

But the reviling of the Constitution and of its makers is only a part of the socialists’ campaign to wreck this government and to bring about “the one great end of the Co-operative Commonwealth.” The Declaration of Independence is subjected to their defamation. In a “patriotic edition” of the socialist organ “Age of Reason,” published at Dallas, Texas, in July, 1914, it is declared that the patriots of the revolution, when they returned home from their battles

“found that the thieves of America had written this document to fool the workers with. \* \* \* They were then compelled to go to this robber-creditor class (who had written the beautiful document above referred to) for supplies to make a crop. These liberty-loving thieves were also the lawmakers—the makers of the laws they had passed to imprison men for debt. \* \* \* Could the demons of hell hatch a more damnable plot against the working class? \* \* \* Just a few men have the right to make the laws, hence they make the laws so that just a few men can own the property. \* \* \* They framed this document so that it would arouse the ire of the working class and cause them to rise up and drive the British out of this country, and give to this bunch of American capitalists the right to make the

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8. Pearson's Magazine, August, 1913, p. 149.

laws so that they could take the place of the English capitalists and rob the working class."

In these manifestoes of socialism the words "rob," "robbery," and "robber" are not used in any figurative sense, nor so intended. The Declaration of Independence and the Federal Constitution are traduced as instruments deliberately concocted to perpetuate fraud, robbery and oppression. A government which has its basis upon those instruments is held up to derision as a government of fraud and of robbery, a government of injustice, a government of exploitation of the weaker for the benefit of the stronger, a government of oppression, a government wicked in its formation, wicked in its administration, and wicked in all its promises for the future. Righteously and logically, according to orthodox Socialism, our government is only the deserving object of enmity and attack and overthrow by every citizen within its jurisdiction.

What more need be said to show the menace of the socialist attitude toward our Federal Constitution?

#### THE ENCROACHMENTS OF SOCIALISM

The strength of the socialist movement is by no means commensurate with the number of votes cast for a socialist candidate, nor by the numbers claimed as adherents to the socialist creed. It already has its representatives in the halls of Congress, in the State Legislatures, as well as among mayors of cities, and in aldermanic councils. The immediate menace of socialism to our form of Government arises from the fact of the increasing tendency toward a socialistic attitude of mind, in respect of our laws and institutions, by those who would disavow the name of "socialist." It lies in the increasing tendency toward experimentation in legislation, in the tendency to try out this theory or that and to force the courts, under the stress of what is assumed to be a "preponderant public

opinion," to make the constitutional limitations yield to the demands of temporary popular opinion under the guise of the extension of what is denominated the "police power" of the State and of the Nation. By subtle steps the objects of socialism are, in many ways, being slowly accomplished; and already, I venture to say, through the influence of such tendencies, actual encroachments upon our constitutional safeguards have been made, and others are threatened.

The menace of socialism to our Constitutional government is not merely theoretical, it is a practical, presently encroaching menace. Let us consider a few concrete examples of its manifestation.

#### THE JUDICIAL RECALL AN INSTRUMENT OF SOCIALISM

The ultimate object of socialism being to abolish private property rights, it naturally centers its first attack upon those functions of our present governmental system which were established for the very purpose to protect individual rights and liberty and to safeguard them from encroachment by legislative whim. The function of the courts, established under the Federal Constitution, to invalidate legislation which is confiscatory of property rights, and therefore repugnant to constitutional limitations, is first sought to be undermined by depriving judges of the independence necessary to the exercise of the judicial function. So the socialists were the first to advocate the Judicial Recall, and that measure stands to-day as a plank in the socialist party platform. The recent movement in this country for the judicial recall, whether in the form of recall of judges or recall of judicial decisions, is socialistic, and in this movement many men, including some members of the bench and the bar, have become the allies of socialism, although many of them would pretend to repudiate such alliance. Progress in this movement has been halted, through enlightenment



of the voters as to the dangers to our institutions of the adoption of judicial-recall measures. It is, however, significant of the menace of socialism to our institutions that, beginning with Oregon; in 1908, the recall of judges was written into the Constitutions of California in 1911, Colorado in 1912, Arizona in 1912, Nevada in 1912, and Kansas in 1914; and that in Colorado the same constitutional amendment provide for the recall of judicial decisions. Moreover, in many other states the judicial recall has been proposed for constitutional amendment and has been introduced in the state legislatures and received substantial, and in some instances nearly successful, support. In Arkansas, a constitutional amendment for the recall of judges, which was initiated by the people, was passed at the 1912 election, but was invalidated by the State Supreme Court on the ground that it had not been properly submitted to the people. While now apparently discredited, through increased understanding of its real significance, the Judicial recall is still advocated by the socialists and their allies as an instrument for striking at the very foundations of our government. To the socialists it is the first feasible step for destruction of our present system of government. The socialist organ, "Appeal to Reason," referring to the judicial recall, has said:

"It is the means whereby the people will be enabled to inaugurate socialism, and after that is done they may secure democracy in industry."

#### SOCIALISM WOULD ELIMINATE ALL JUDICIAL FUNCTIONS

The advocacy of the judicial recall is a measure calculated indirectly to eliminate the judicial function. But the socialists and their allies make a more direct attack upon the established functions of our judicial departments, state and national. They seek to eliminate that function of the judiciary the exercise of which constitutes the keystone of constitutional safeguards to life, liberty and property of the individual. They regard the only power which is established to enforce



constitutional limitations as a power "usurped" by the courts themselves, in derogation of the rights of citizens; for they recognize the fact that it is this so-called "usurped" power by the exercise of which the individual rights of property and of liberty, vouchsafed by our constitutional government, are safeguarded, and that so long as this power is exercised by a free and independent judiciary the establishment of a new and different system of government, based upon the common ownership of everything is impossible.<sup>9</sup> The judicial function of declaring invalid any statute which contravenes constitutional safeguards to individual rights of property and liberty is, so long as it continues, a barrier to the establishment of a government of Socialism. The attack upon this function made by the socialists is of two kinds.

They would have the judiciary itself, including the United States Supreme Court, reverse the decision of Chief Justice Marshall in the case of *Marbury v. Madison*<sup>10</sup> and in all the subsequent cases based upon that decision, and, by judicial construction, leave the express constitutional limitations as mere scraps of paper announcing rules of conduct which are to be honored or dishonored at the whim or caprice of a voting majority at any time or in any locality. For the determination of the question of constitutionality of any statute, they would substitute, in the place of the careful *judgment* of a tribunal of triers experienced and learned in the law, the arbitrary and capricious *pre-judgment* of comparatively incapable arbiters declared at a mass meeting or at a referendum election.

Doubting the voluntary surrender by the courts of this established function, the socialists advocate the express denial by constitutional amendment of the power of the courts to invalidate legislation as repugnant to constitutional limitations.

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9. "The Usurped Power of the Courts", by Allan L. Benson, Pearson Pub. Co., 1911.

10. *Marbury v. Madison*, 1 Cranch 137.

An active propaganda in promotion of such change is now carried on throughout the country; and it is participated in by avowed socialists and by others who are, either directly or indirectly, the allies of socialism.

Within three years an Ex-President of the United States, in speaking to the people of South America, referred to the power now exercised by our courts to enforce constitutional safeguards as a power which was "arrogated" to, and "usurped" by, the courts themselves. He stated at the same time that the courts of this country had for more than thirty years exercised their powers "with inexcusable and reckless wantonness on behalf of privilege" and against the interests of the people.

A Chief Justice of a state supreme court has become a leading muckraker of our constitutional system and a rank supporter of this "usurpation" theory. He speaks and writes in the terms of socialism, both in his views as to the motives of the makers of our Constitution as well as his views in regard to its subsequent enforcement. Its origin and enforcement are, he says, the work of "exploiters," intended and operating as an instrument of oppression and injustice. He characterizes the decisions of the Federal Supreme Court as "perversions of the law" and the reasoning of those decisions as instances of "sardonic irony" and of "adding insult to injury."<sup>11</sup>

The menace of this socialist attack upon our judicial system is not merely potential or theoretical. Its influence has already been so extended that means of enlightenment as to the dangers of this socialist fallacy have been organized by the bar associations of the Nation and of the States. A propaganda of education as to our constitutional government has for six years been carried on by the American Bar Association through its Committee to Oppose Judicial Recall. For over

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11. "Government by Judges", address by Chief Justice Walter Clark of the North Carolina Supreme Court, at Cooper Union, New York City, January 27, 1914; also "Some Myths of the Law," by same author, Michigan Law Review, November, 1914.

three years a special committee of the New York State Bar Association "Upon the duty of courts to refuse to execute statutes in contravention of the fundamental law," under the efficient chairmanship of Henry A. Forster of the New York City bar, has rendered valiant service in the same cause.<sup>12</sup>

Back of every attempt to weaken or eliminate the judicial function, or to diminish the independence of the judiciary, the socialist agitator is always found most active. So the socialist supports the proposition, which has been made part of the Ohio Constitution and is sought to be applied in all national and state courts of review, to compel either a unanimous, or more than a majority, opinion of an appellate court to declare a statute invalid on the ground of its repugnance to constitutional provisions. For the same reason it has become a plank in the socialist political platform that all judgeships be made elective, and that, too, only for short terms. Ultimately they would eliminate the judicial function; but, until that object is accomplished, they would resort to every possible step leading to the weakening of the judicial power.

#### SOCIALISTIC INDUSTRIAL MEASURES

While not constituting direct attacks upon our constitutional government, there are certain industrial measures which have been grafted upon our state constitutions and legislation, the source and object of which are purely socialistic. They are socialistic encroachments, by legislative or judicial extension of the police power, to the extent that in many instances there is effected an arbitrary confiscation of individual rights of liberty and of property.

A fair example of such legislation is that of the statutory minimum wage in private employment. Such statutes are

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12. See First, Second and Third Reports of this Committee, presented at the annual meetings of the New York State Bar Association in January, 1915, 1916 and 1917.

based upon the socialistic, Utopian theory that each individual has a "generic right" to receive, through legislation, all the means necessary for a comfortable living, and this too, independent of capacity, efficiency, or return in any way by the individual to the source of supply. The minimum wage statute in private employment forbids the employer or employee to make any valid contract for labor except for at least a minimum wage based upon the necessary cost of living according to a standard arbitrarily fixed by some commission or by statute. Of course, the excess over what the capacity or efficiency of the employee returns in work-worth to the employer, is a forced contribution to the purely individual needs of the worker,—needs which do not arise out of, and have no relation to, the fact of employment or to the occupation in question. The forced contribution of such excess is, of course, a taking of property. Moreover, the denial of the right of the worker to make a labor contract for what he is worth tends to render him jobless and without means to himself or to his family of any wage. Such statutory contribution by the employer is in fact a compulsory division of his property between himself and those who happen to be upon his payroll. It is all based upon the socialist theory of division of property between those who have and those who have not. Nevertheless, such statutes have been passed, in one form and another, in Massachusetts, Nebraska, Arkansas, California, Colorado, Minnesota, Oregon, Utah, Washington and Wisconsin. The Oregon statute was upheld by the Oregon State Supreme Court and the judgment therein recently affirmed by the United States Supreme Court by a divided court. Of eight judges qualified to sit in the case, four were in favor of such extension of the police power, and four were against.<sup>13</sup> Such affirmance, only by reason of a divided court, leaves undecided the federal questions involv-

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13. *Stettler vs. O'Hara, et al, and Simpson vs. O'Hara, et al*, (Oregon Minimum Wage cases), affirmed by U. S. Supreme Court by divided court, April 9, 1917.

ed. This result is significant, because it shows the danger of the slow, but steady, encroachment upon our constitutional limitations due to the influence of the socialist propaganda. No thoughtful lawyer of twenty years or more ago, or even ten years ago, would have imagined that such legislation had any chance of escaping the condemnation of any national or state court wherein its validity was questioned on the ground of its being repugnant to the Fourteenth Amendment.

So, in other ways, the police power of regulation has been extended beyond the limits of mere regulation. It has been extended to placing the state in the control, and even in monopolistic control, of business enterprises which theretofore had been considered proper only for private management. The business of insurance seems now on the way to passing from a private enterprise to an exclusively state or governmental enterprise. State insurance laws, casualty and otherwise, have been passed and put in force in several states. The statute of the State of Washington providing for compulsory monopolistic casualty insurance through purely state management, was recently sustained by the United States Supreme Court.<sup>14</sup>

The State of North Dakota is now, and has been for two years, practically in the control of a socialist organization known as the farmers "Non-Partisan League." Many of its measures, socialistic in their nature, have been carried through the state legislature, and a new socialist State constitution has been proposed, and was nearly passed in the last legislature, whereby state socialism was to be established, under which the State or any political subdivision thereof should have the right "to engage in any occupation or business for public purposes." The object was in the first instance to take over to the State all elevator systems, flour mills, "and other things of a like nature." Besides provisions for initiative, referendum and re-

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14. *Mountain Timber Co. vs. State of Washington*, (decided March 7, 1917).

call, including judicial recall, there was also proposed the constitutional provision that:

“No act, law, bill, measure or resolution, or part thereof, adopted by vote of the people shall be held unconstitutional, or come within the veto power of the Governor, or be amended or repealed, except by the vote of the people.”

Other encroachments made through the influences of socialism upon our institutions are manifest in many ways. Of course, it is not necessarily an objection to a measure that it is also favored by the socialist. From a constitutional viewpoint, many measures which are by their opponents viewed as socialist attacks upon our constitutional government, present questions fairly open to debate. I have mentioned a few which, to me personally, seem to evidence actual encroachments upon our form of government. The socialists work through their own organization and members, and also through those who, from time to time or at one place or another, can be made allies in the accomplishment of some socialist object. The orthodox socialist denies that he is allied with the more radical or anarchist member of the I. W. W. Nevertheless, members of both these organizations are found at different places and times, working hand in hand. And various labor organizations, state and national, while repudiating both socialism and anarchism, are here and there discovered working shoulder to shoulder with both the Socialist and I. W. W. organizations to put through and compel the enforcement of legislation which is purely socialistic in its nature and is intended as a step to the final overthrow of our present form of government. These combined forces were ever present during the last state legislature in Minnesota, and incessantly active in the formulation and introduction of countless measures intended as steps to the establishment of the socialistic order.

Again, it was the menacing monster of Socialism, stripped of its mask of peace, showing its brutal teeth and its iron hand

fully armed in preparation for violence and bloodshed, which, in September last, held the threat of an organized and prepared industrial revolution over the heads of the 64th Congress and intimidated our national legislature into the passage, either against judgment or without opportunity for deliberate judgment, of the so-called "Adamson Law," by which the demands of a certain class of workers, which they had refused to submit to arbitration, were arbitrarily imposed upon the railroad employers. It matters not that the Adamson Law has since been held not unconstitutional. This incident of setting a time limit for action by the national legislature, by an organized mob clamoring with threats of violence at the very doors of the Congress, is most significant of the methods of legislation which are to be practiced when the new era of Socialism shall be established and when no constitutional limitations shall even pretend to stand between the mob and the property owner, and when the courts, even if they still exist in form, shall have been shorn of their judicial functions.

Manifestations of the progress of Socialism, encroaching already upon the individual rights of property and of liberty, are becoming more and more apparent. Socialism has already made long strides toward the accomplishment of its ultimate object, and each success, whether effected by subtle invasion or by open defiance and threat, adds to the boldness and persistence of the activities of its adherents. The instruments of its propaganda are spread broadcast, breathing enmity to our free institutions and to our constitutions, teaching the doctrine of class hatred and inciting all the elements of unrest to prepare for the final revolution by violence, which is the ultimate goal of every socialist.

Under the euphemistic term of the "Co-operative Commonwealth" of Socialism, are hidden those organized and active forces of internal disruption and revolution which are to-day the greatest menace to our Constitutional Government.











WHY SHOULD WE CHANGE OUR FORM  
OF GOVERNMENT?

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ADDRESS

BY

NICHOLAS MURRAY BUTLER

PRESIDENT OF COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK

BEFORE THE COMMERCIAL CLUB OF ST. LOUIS

NOVEMBER 27, 1911



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## WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT?

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**MR. PRESIDENT AND GENTLEMEN:** It is a sincere pleasure to find myself back again in St. Louis and privileged to speak to the members of this club. You will forgive me for saying that in the presence of so many old and valued friends I feel very much at home.

In response to the invitation of your committee, I have ventured to suggest a rather serious subject for discussion. It is one which does not easily lend itself to flights of after-dinner oratory or to that flow of wit and humor which we all so much enjoy. I have selected this serious subject because I know that this club is composed of thoughtful and reflective men, of men who busy themselves with matters of high import in the life of our Nation; and it is my strong belief that the question which I venture to put is one which every intelligent American ought to be asking himself at this time: Why should we change our form of government?

We have been reminded of late that it is a full half century since the beginning of that outbreak which threatened the existence of our Nation as it had been built by the fathers. As we look back now, at least those of us who are too young to have participated in that mighty struggle, who are too young to have known of it save by hearsay, we can see and understand that the American Civil War was an attack made upon the Government of the United States by strong and determined men animated by what they seriously believed to be sound principle and deep conviction. They made their appeal to the supreme tribunal of physical force, and they lost their cause. To-day every American is glad that that cause, however splendid, was lost, and that the Government founded by the fathers was perpetuated, let us hope for all time.

But now in the short interval of a generation since that great struggle closed there is under way a persistent, determined, and highly intelligent attempt to change our form of government. This attempt is making while we are speaking about it. It presents itself in many persuasive and seductive forms. It uses attractive formulas to which men like to give adhesion; but if it is successful it will bring to an end the form of government that was founded when our Constitution was made and that we and our fathers and our grandfathers have known and gloried in.

To put the matter bluntly, there is under way in the United States at the present time a definite and determined movement to change our representative Republic into a socialistic democracy. That attempt, carried on by men of conviction, men of sincerity, men of honest purpose, men of patriotism, as they conceive patriotism, is the most impressive political factor in our public life of to-day. In my judgment it transcends all possible differences between the historic parties; it takes precedence of all problems of a business, a financial, or an economic character, however pressing, for it strikes at the very root of the Government of the United States and the principles upon which that Government rests. It strikes at the very root of the institutions that we call Anglo-Saxon, and it proclaims a failure that great movement for the establish-

ment of liberty under law, controlled and carried on through the institutions of representative government, a movement which had its origin more than 2,000 years ago in the forests of Germany, and which has persisted with constantly growing force and power throughout the history of the English-speaking peoples down to our own day. We are now told that representative government has failed. We are now told that the people are either incompetent or unable to choose representatives who will really serve their highest interests and who will be beyond the reach of the temptation offered by money or power or place. The remedy is said to be to appeal over the heads of the people's chosen representatives to the people themselves.

Let us look for a moment at this proposal and try to understand what it means. I have written down here a sentence or two from the pen of James Madison. When Madison made his contributions to the *Federalist* he wrote in one place:

"In a democracy the people meet and exercise the government in person; in a republic they assemble and administer it by their representatives and agents."

A little later on he wrote:

"A republic is a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."

It is clear, therefore, even if these passages from Madison were the only evidence, that the founders of our Government knew and had studied the difference between a representative republic and a direct democracy.

I suppose that never in the history of the world, before or since, has there been displayed so much insight into the principles of government, so much knowledge of the theory and practical workings of the different forms of government, as that which accompanied the formulation and adoption of the Constitution of the United States. Truly, there were giants in those days; and whether we take one view of the meaning of that great document or another makes no difference. The making of the American Constitution was a stupendous achievement of men who through reading, through reflection, through insight, and through practical experience, had fully grasped the significance of the huge task to which they devoted themselves, and who accomplished that task in a way that has excited the admiration of the civilized world. Those men built a representative republic; they knew the history of other forms of government; they knew what had happened in Greece, in Rome, in Venice, and in Florence; they knew what had happened in the history of the making of the modern nations that occupied the continent of Europe. Knowing all this they deliberately, after the most elaborate debate and discussion both of principles and details, produced the result with which we are so familiar.

Let us not suppose, however, even for a moment that that great enterprise had no genesis, no history.

When half-civilized man began to take account of his public concerns he was controlled by a single leader, military in character and in method. That leader was at once executive, lawmaker, and judge. You may read to-day, if you will, in some of the great museums of the world, the laws of ancient oriental peoples carved on stone, and bearing the names of the monarchs who passed them by their edicts. You may, if you choose, review the entire history of the early European forms of government, and you may take note how the emphasis is laid now upon one element of public life, now upon another. At one moment it was the legislature which was exalted, at another it was the executive, at still another it was the military leader. You may see, if you will, the building up of a great world empire under the leadership of Rome; you may watch the breakdown of that Empire, due to forces working in part from

within and in part from without; you may see one form after another of absolutism grasping the reins of government over intelligent peoples, longing for a chance to develop trade and commerce; and if you can visualize the map of Europe while all this is going on, you will see on it two bright particular shining spots. The one spot is little Holland, and the other is England. Those two bright spots mark the places where the principles of representative government, based upon the intelligent action of a free people, were at work, and they are the two sources from which our modern world has learned all its great lessons of civil and religious liberty. It was Holland which provided a resting place for the strong men who were sent to find their way across the Atlantic to the shores of Massachusetts Bay. It was England which had developed parliamentary representative institutions to the greatest perfection. From England we learned these lessons, and they have grown long and deeply into the life and thought of the American people. In our great Federal Republic these lessons have been applied, and the principle of representative institutions has been worked out on a scale and with a magnitude that are without parallel in the history of political action.

The governmental changes which are now proposed to the American people are not brought forward as philosophic propositions to be examined and passed upon in principle; they are not brought forward as a complete and conscious program to be debated and discussed by bodies like this, to be compared with the results of the experience and the activities of the past 125 years. These changes are presented to us as specific proposals to be passed upon now here, now there, in the light not of principle but of temporary expediency. In the name of reform or of progress we are asked to give our assent now to this specific proposal, now to that. But, these specific proposals, when taken altogether, when regarded collectively, constitute an invitation to surrender our representative Republic and to build upon the place where it once stood the structure of a socialistic democracy.

It may be, perhaps, that a social democracy is a better form of government than the representative Republic which we now have. It may be, perhaps, that under the institutions of a socialistic democracy mankind would be happier; opportunity more free, property more equally distributed, and the satisfaction of man's wants more easily accomplished than now. All these things may be; but if a socialistic democracy is to be substituted for a representative republic, please do not overlook the fact that it can only be so substituted by revolution. There must first be a revolution in our fundamental political beliefs; there must first be a revolution in our accustomed forms of political action; there must first be a revolution in our point of view, in our ambitions, and in our aspirations.

What are the charges that these revolutionists bring against the representative republic? We are told in the first place that the representative republic fails really and readily to reflect public opinion; that these representative institutions easily become the prey of the self-seeker, of the special interest, of the wirepuller, of the schemer, of the man who would use the public for his own personal advancement or enrichment; and that, therefore, they must be uprooted, overturned, and destroyed. We are told, in other words, that after not only 125 years of our own experience, but after 500 years of the experience of the Anglo-Saxon peoples, these representative institutions have failed, and that in the name of progress we must pass on to a direct democracy. We are told that we should begin by so shackling representative institutions that they must respond at once, mechanically, and with precision to the expressed wish or the expressed emotions of a majority of the voting population at any given instant, regardless of the fundamental constitutional guarantees of civil and



political liberty. We are told that if we do this we shall restore government to a purely democratic form, that we shall make it responsive to the public will and to public opinion, and that every legitimate public and private interest will thereby be promoted. Surely this is an ambitious program.

Before we give our assent to it, however, suppose we examine for a moment the point of view and the contentions of those who are the mouthpieces of this revolutionary movement. We are justified in asking in the first place whether the attempt to substitute a direct democracy for a representative republic is progressive or reactionary. It is the history of all evolutionary processes that for particular purposes special organs are developed; for particular activities special instrumentalities are produced; and in developing any truly forward movement we proceed from the simple to the complex. In organic evolution the process is one away from the gelatinous and formless mass of the lower organisms to the exceedingly complex structure of the higher mammals. Obviously, then, it is at an earlier stage of evolution when one organism or instrumentality performs all functions, when one organism or instrumentality carries on government in all its forms, as well as those economic activities which result in providing clothing, shelter, and food. As we develop, however, and as we progress, we differentiate; we throw out feelers, as it were; we develop special organisms and instrumentalities, social as well as individual; and these divide among themselves the economic, industrial, and the governmental functions of the social unit. In this way we get a division of labor; in this way we get a specialization of function. A really progressive movement, therefore, is a movement toward differentiation, toward complexity, toward specialization of structure and function. The movement toward the perfecting of representative government is progressive; a movement away from representative government, a movement that would shackle and limit it, and that would appeal from representative institutions to direct democracy, is reactionary.

It may be said of the amoeba that it walks on its stomach and digests with its legs, because it digests with what it walks with, and walks with what it digests with. As yet there has been no differentiation of structure or function. But the amoeba, with its very simple structure, is certainly not in advance of the mammal with its highly organized structure, its differentiation of function, and its many complicated activities. The movement to substitute direct democracy for representative government is a movement back from the age of the mammal to the age of the amoeba. Such a movement may have merits of its own, but they can not be the merits which we attach to genuine progress. It would be just as appropriate to organize a movement, in the name of a progressive democracy, to cut our own clothes and to make our own shoes, when tailors and shoemakers are unsatisfactory, as to assume for the people as a whole the political duties which belong to representative bodies of officials, because these do not in every case do just what we should like. To take a backward step from specialization of structure and of function must not be defended as progressive; it is as reactionary as anything in the whole field of social evolution can possibly be. It is to return from the age of the mammal to the age of the amoeba. Of course it is conceivable that such a movement backward is desirable; but if so, let us at least call it by its right name.

We began in this country to break down the safeguards and to weaken the fundamental principles of representative institutions some years ago, and in two different ways. We began to break them down when in many of our State constitutions, indeed in nearly all of them, we departed from the sound principles of constitution making and filled these important documents full of what really should have been statutory legislation.

The strength and vitality of the Constitution of the United States are found in the fact that it expresses in a few words general principles which are susceptible of interpretation and of adaptation to different needs and conditions. It is for this reason, and for this reason alone, that the Constitution has been maintained and sustained, substantially without change so far as governmental structure is concerned, for a century and a quarter of most unexpected and unimagined developments. A written constitution is a device to protect man's sober and mature political judgment from his fleeting political passions and prejudices. The moment that you write into fundamental law a definite and precise statement of momentary political feeling in regard to some matter of governmental detail, that moment you have broken down the distinction which should exist between a constitution and a statute. A constitution should contain only those guaranties of civil and political liberty which underlie our whole organized society, and also make carefully drawn grants of power to legislative, executive, and judicial officers, as well as those major political determinations that persist, and are persisted in, through changes of party and of political creed. Of course, no constitution is permanent and unamendable, for even fundamental principles take on new aspects with changes of circumstance. Nevertheless, if our American Government is to endure, we must acknowledge and maintain the broad distinction which exists between the making of a constitution and the enactment of a statute.

In many of our States, particularly in those which have been organized in recent years, the so-called constitutions are an odd and curious medley of genuine constitutional principles and a host of statutes. It is not proper to include in a State constitution provision for the specific location of a State university; it is not proper to include in a State constitution the amount of compensation to be paid annually to the State auditor; it is not proper to include in a State constitution any one of the hundreds of merely incidental details of government that it is now fashionable to put upon the same plane with vitually important expressions of fundamental political principle.

The results of this confusion between a constitution and a statute are most unhappy. If, for example, it is desired to change the location of a State university or to increase the salary of the State auditor, the constitution must be amended. If it can be so easily amended in one particular, why not in all others? At that moment the fundamental political guaranties have lost their sacredness and are reduced to the same plane of mere expediency as the location of the State university and the amount of the auditor's salary.

We departed and we departed widely and far in this country from the sound principles of constitution making when, at first under the influence of the movement of 1848 in Europe and later under the influence of the various compromises and personal ambitions which entered into the making of some of the newer States, we began to turn the fundamental law of our various Commonwealths into a huge collection of statutory details. In so doing we have confused the public understanding of what a constitution really is, and we have opened the door to every form of experimentation with our fundamental principles on the same basis as perfectly proper experimentation with the merest details of our whole legislative and political activity.

Then, in the second place, we began the destruction of the fundamental principles of representative government in this country when, under the lash of party, we reduced the representative to a mere delegate; when we began, as is now quite commonly the case, to instruct a representative as to what he is to do when elected; when we began to pledge him in advance of his election that, if chosen, he will do certain things and oppose others—in other words, when we reduced the representative from the high, splendid, and dignified

status of a real representative chosen by his constituency to give it his experience, his brains, his conscience, and his best service, and made him a mere registering machine for the opinion of the moment, whatever it might happen to be.

On this point there is a classic expression which every student of government knows and knows well. It is to be found in the address made by Edmund Burke to the electors at Bristol, in which he expresses in words that are never to be forgotten the real duty of a representative to those who have chosen him. Let me read what Burke said:

"It ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect; their business unremitted attention; but his unbiassed opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. Your representative owes you not his industry only but his judgment; and he betrays instead of serving you if he sacrifices it to your opinion. You choose a representative indeed, but when he is chosen he is not a member of Bristol, but a member of Parliament."

We may say, substantially in Burke's phrase, that when we choose a Member of the House of Representatives he is not a Member of the first district of New York or of Pennsylvania or of Ohio or of Missouri, but he is a Member of the Congress of the United States.

But we are told that this form of democracy is not satisfactory; it is not possible with these processes and on these principles to accomplish things that some people want to have accomplished. We find, it is said, that our Representatives are getting out of our control; they do not do what we tell them. Of course, they come back after two years or four years and submit themselves to their constituents for judgment, but think of the mischief they can do in these two years or these four years which can not be undone speedily, if at all. Therefore we are told we must change our form of government and put the entire democracy in direct control of every governmental process.

It is not necessary for those of us who believe in a representative republic to say that it has no shortcomings. It is not necessary for us to take up the position that everything goes on in a way which is beyond criticism. We need not do that. We must look the facts in the face. We should admit the limitations of ourselves and of other human beings; we know the deficiencies and defects that constantly present themselves in our governmental administration, whether National, State, or municipal. But suppose we ask ourselves this question: Need we destroy fundamental principles to correct temporary infelicities? Need we pull up our institutions by the roots because they do not grow quite fast enough to please us? These are the questions which the American people have got to answer, and which many of them are to-day ready to answer by saying, "Let us destroy our fundamental principles; let us pull up our institutions by the roots in order to see why they do not grow faster."

The proposition to substitute a direct democracy for a representative republic has some features that are serious and some that are amusing. We are told, for instance, to look at the town meeting and see what a splendid institution the town meeting has been in New England. Imagine a town meeting in Chicago. Imagine bringing together on the third Tuesday in March, in one corner of the prairies of Illinois, the entire voting population of Chicago in order to submit to them the questions which are submitted to the town meetings of the sparsely-settled hill towns of New England. Is it not ridiculous? Of course. Why is it ridiculous? Because it is an endeavor to apply a principle sound

in itself under circumstances where it can not possibly work. It is an attempt to arrive by a purely logical process at a political rule of action without taking into account the facts and considerations of a particular case. The moment you ask yourself why it is ridiculous to govern Chicago by a town meeting, and find that it is, that moment you ought to be ready to understand why representative institutions grew up among English-speaking peoples and why they have continued to exist to the present day. But the objector says: "I grant that you can not have a town meeting in the case of Chicago; that must be given up as impracticable; but there is something else that we can do. We can retain our representative institutions, but so limit them and so shackle their operations that we retain for ourselves the right to initiate legislation and the right to veto any legislation that our representatives may see fit to pass."

Examine for a moment these suggestions in order to see what they really mean and to what they really lead. In the first place, please do not overlook the exceedingly important fact that all those who are uniting to urge upon us this transformation of our form of government invariably propose to put these instrumentalities of a direct democracy into operation upon the initiative of a very small fraction of the electorate. What a glorious time it would be for the perpetual disturbers of political peace! It is proposed, for instance, that 5 per cent or 8 per cent of the electorate shall be sufficient to initiate legislation and to demand a poll of the people thereon. Legislation so initiated can not be amended or perfected in form. It can not be examined in committee, its sponsors can not be cross-questioned; it must be taken or left precisely as they project it into the political arena. Is there any community in the world where 5 per cent of the adult males can not be gotten to sign a petition for anything? Is there any community in the world where if 5 per cent of the adult males had petitioned for something that had been denied, they could not be gotten to petition for it again without delay? Would not life under this system become one long series of elections? Should we not be chasing each other to the polls once a week to pass upon some new legislative proposal, and not always one presented by the wisest and most thoughtful of our citizens? What would be the effect of all this on the members of our legislative bodies, National and State? Are the best men in your community going to accept nomination and election to a legislative body any one of whose acts, however carefully formulated, may be brought up for review and possibly overturned on the initiative of 5 per cent of the voting population? We complain that we do not always get the men we would most like to see in the State and National legislatures. Should we get a better class of representatives, or worse, if we took away their sense of responsibility, took away their dignity and authority, and set ourselves up on every side to duplicate or possibly to overturn their every act? There is only one possible answer to that question. We should degrade our legislative bodies and reduce them to intellectual, moral, and political impotence.

Of all the proposals that have been brought forward in the name of direct democracy, the initiative is the most preposterous, and the most vicious. It is far more objectionable than the referendum, which is ordinarily bracketed with it, because it is intended to project a legislative proposal upon the community at the instigation of a very small number of people, which proposal must then be passed upon without amendment; without any opportunity to perfect it, even in phraseology; without any chance to receive and act upon suggestions for its extension, its narrowing, or its betterment; and without opportunity for any one of the processes of discussion and revision which are offered to-day by the operation of the rules of procedure which control legislative bodies and their committees. Under the action of the initiative, a community is called upon to say yes or no to a proposal framed by 5 per cent of anybody.

I submit that this is very like having to answer the question, "Have you left off beating your grandmother?" If you answer "yes," you embarrass yourself; if you answer "no," you embarrass yourself still more.

All that can possibly be accomplished by the initiative is to strike the heaviest possible blow at representative institutions, and to remove the last inducement to bring able, reflective, and intelligent men to accept service in a legislative body. The initiative will result in registering in more or less rapid succession the consecutive emotions of a small proportion of the electorate; because if you will examine the records where the initiative has been introduced, you will see that whatever action has been taken has been so taken by the vote of a small minority of the voting population. Consideration by chosen representatives disappears, the perfecting of a measure through committee consideration and public debate is made impossible; some preconceived scheme for which there is a sentiment among a small portion of the community must be accepted or rejected in toto.

This is not a policy which makes for stable and consistent government. This is not a progressive policy. This is not a policy which will develop and strengthen the institutions that we have inherited and that we are seeking to apply to new conditions. This is not a policy which will bring support to the fundamental guaranties of civil and political liberty upon which our National Government rests.

But it may be urged, surely those fundamental guaranties are not questioned or doubted. I beg to assure you that every single one of them is questioned and doubted in this country, and questioned and doubted by no inconsiderable body of opinion, some of it not lacking in intelligence, very energetically represented in different parts of the United States. We may close our eyes to all this if we like. We may, with our consummate American hopefulness and optimism, say that it will turn out all right; perhaps it will; but the fact remains that there are some of us who believe that the fundamental guaranties which underlie our whole National Government and our national life can not be attacked, can not be denied, can not be made light of, without serious danger to our entire political fabric.

Should not the majority rule? If the majority wish to sweep away all the fundamental guaranties, should they not be permitted to do so? Is that not one of the risks that democratic government must run? Those who believe that we learn nothing in this world from human experience may, if they choose, answer those questions in the affirmative. Those who believe that nothing in this world is fixed or definite or a matter of principle, may answer those questions in the affirmative; but those who believe that we do move forward through the centuries by building upon and using the experience of those who have gone before; those who believe that out of the thousand or two thousand years of political life and activity of the western world there have come some principles which are certain and which abide, and some political guaranties that are vital to human welfare, they will answer those questions no; a thousand times no! Those who believe that we must build our institutions upon foundations that are not subject to continual revision and reconstruction will answer no; a thousand times no! We point to the fundamental guaranties of the British and American Constitutions, and say that those are beyond the legitimate reach of any majority because they are established in the fundamental laws of human nature upon which all government and civilization and progress rest. Sweep them away, if you will; a majority may have that power, but with the power does not go the right. If they are swept away, all government and all liberty go with them, and anarchy, in which might alone makes right and power alone gives place, will rise upon their ruins.



There is nothing new about all this. Aristotle pointed out that democracy has many points of resemblance with tyranny. It was he who first told us how democracy as well as a tyranny may become a despotism. It was he who first pointed out to us the likeness that there is between the demagogue in a democracy and the court favorite in a tyranny. If democracy is not to become a tyranny it must recognize and build upon those constitutional limitations and guaranties that are so precious to the individual citizen and that protect him in his life, his liberty, and his property. It is not in the power of any majority to sweep these away without sweeping away with them the whole fabric of the State in violent and destructive revolution. The other day, in turning over the pages of John C. Calhoun, I came upon a most extraordinary sentence which bears upon this very point. Almost a century ago Calhoun wrote these words:

"The government of the uncontrolled numerical majority is but the absolute and despotic form of popular government, just as the uncontrolled will of one man is monarchy."

Control there must always be if there is to be liberty. That control is law, built in turn upon those limitations and guaranties which are our Constitution. It is just as easy for a majority to become a despot as for a monarch to become a tyrant; even a tyrant may be benevolent; even a democratic despotism may be malevolent.

We are now invited to treat these constitutional limitations and guaranties just as we treat mere statutory legislation. They are to be revised, to be amended, to be overturned, in order that the sacred will of a temporary majority may be everywhere and always enacted into constitutional law. To walk in these paths means the suppression of the individual as the unit in the scheme of liberty. It means the extinction of liberty as we have known it. It means what I call a socialistic democracy, because it means that the majority will take direct and responsible control of your life, your liberty, and your property. All that constitutes individuality will have gone by the board; it will have been poured into the great boiling pot of the social whole, there to be reduced to a single incoherent mass to be exploited as the will of this or that majority may from moment to moment determine and advise. This may be progress, but it is certainly revolution.

Then there is another device urged upon us in the name of progress, known as the referendum. This differs widely from initiative, and has no possible relationship to it. It is, in effect, a popular veto on the acts of the legislature. Our American institutions provide almost without exception for an executive veto. The executive veto exists for the purpose not necessarily of permanently defeating legislation, but to compel its reconsideration, its public discussion, and its restudy by the people themselves, by the press, and by the people's representatives. It is a wise and appropriate institution. Experience has shown that while it is not often used, it may serve, and does serve, as a check upon hasty and ill-considered legislative action.

The referendum, however, is quite different from the executive veto, and, in the form in which it is now urged, is like the initiative in that it tends to destroy the responsibility of the legislator and to make the legislature itself a very subordinate and timid body. If any community or State insists upon subjecting the ordinary work of its legislature to a general referendum, it insists at the same time that it shall be served in its legislature by second-rate and third-rate men, and that its representatives shall be turned into delegates. Edmund Burke would find no place in such a scheme of politics as that. Once more I say, to introduce the referendum as a check upon the legislature may be progress, but I insist that if it is progress it is also revolution. It is revolution because it strips away more and more elements of strength, independence, and

power from the legislature. The legislature exists in order that different views may be studied and compared; in order that acts may be considered and perfected by hearing all parties and all interests, in order that amendment and discussion may be possible. All this is stripped away if there is behind each legislator's chair a controlling force which says, "If you do so-and-so we shall upset it by a general vote, as we, your creators, have a right to do."

Lord Acton in one of his essays, I think it is the one on the history of liberty, pointed out some years ago that the referendum, whatever may be said in its favor theoretically, is obnoxious to all believers in representative institutions, because it contemplates decision without discussion. Of course there is discussion in one sense, but there is no discussion which could in any way operate to perfect a pending proposal; there is no discussion possible that can lead to the amendment or improvement of a proposal. The only discussion that can possibly take place is that which will confirm men in their attitude toward the proposition which is pending.

Of course we are in this country accustomed to a certain limited use of the principle of referendum. State constitutions, as a rule, and State amendments, almost uniformly, are passed upon by the people as a whole. The same is true often in the case of large financial undertakings or bond issues. If the legislature itself takes and may take the initiative in submitting a question to a referendum vote, the damage is in so far limited. To force a referendum vote upon the legislature by constitutional provision would be, however, to inflict the maximum amount of damage upon the representative principle. As a matter of fact, no legislature should seek to shirk responsibility; that is the part of weak and timid men. More than half a century ago the Court of Appeals of the State of New York, in the well-known case of *Barto v. Himrod*, laid down the true doctrine on this subject in no uncertain terms. The court used this language:

"The representatives of the people are the lawmakers, and they are responsible to their constituents for their conduct in that capacity. By following the directions of the constitution, each member has an opportunity of proposing amendments. The general policy of the law, as well as the fitness of its details, is open to discussion. The popular feeling is expressed through their representatives; and the latter are enlightened and influenced more or less by the discussions of the public press.

"A complicated system can only be perfected by a body composed of a limited number, with power to make amendments and to enjoy the benefit of free discussion and consultation. This can never be accomplished with reference to such a system when submitted to a vote of the people. They must take the system proposed or nothing. They can adopt no amendments, however obvious may be their necessity. \* \* \* All the safeguards which the constitution has provided are broken down, and the members of the legislature are allowed to evade the responsibility which belongs to their office. \* \* \* If this mode of legislation is permitted and becomes general, it will soon bring to a close the whole system of representative government which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of lawgivers, and with just wisdom enough to devise subtle schemes of imposture to mislead the people. All the checks against improvident legislation will be swept away, and the character of the constitution will be radically changed."

Do you fully realize with what levity we are now passing upon this important issue of the referendum in this country? Do you realize in what complexity important governmental proposals are being submitted to thousands and tens of thousands of voters, and with what light-hearted frivolity they are being passed

upon? A few weeks ago the great State of California, one of the most intelligent and wealthiest States in the Union, completely revolutionized its form of government by passing at one and the same election 23 amendments to its constitution by enormous majorities. It has, however, escaped attention that the total vote cast for and against these revolutionary proposals was about 60 per cent of the vote cast for President in 1908 or that cast for governor in 1910. Apparently the number of people in California who are interested in their form of government are only about six-tenths of the number that were interested in who should be President of the United States or who should be governor of the State. Of the 23 amendments that were presented to the people of California on one and the same ballot, some half dozen were genuine constitutional amendments; the rest were almost without exception matters of legislation, some of them very trifling.

If you have not already seen it, I want to show you the document that was sent by the secretary of the State of California to every registered voter in the State. [Here the speaker exhibited a large sheet closely printed on both sides.] You will observe that the State officials who got up this amazing document did not expect it to be read by anybody. It is solidly printed in small type on both sides of one sheet, and there is the trifling little matter of a supplement with three or four amendments on a separate sheet. Here are printed the questions that were submitted not to the Court of Appeals of California, not to the professors of political science in the State university, not even to the legislature of the State, but to the voters. I submit that the whole proceeding is ridiculous. Look at these pieces of paper. In 1908, 386,000 voted for President in California; in 1910, 385,000 voted for governor. The highest vote cast on October 10 last for any of these amendments was cast in regard to the amendment relating to women's suffrage. The total vote on that amendment was 246,000; 140,000 fewer than were polled three years before for President and 139,000 fewer than were polled two years before for governor. Women's suffrage was carried in California by an affirmative vote of 125,000, or 2,000 less than Mr. Bryan received in 1908, when he lost the State by nearly 90,000 majority.

Is it not obvious, then, that we are changing our form of government in the United States by a minority vote? Here is an amendment which doubles the number of voters in the State by removing the limitation of sex; here is action which establishes the initiative, the referendum, the recall, including the recall of judges; and every one of them is an amendment to the constitution of a great, rich, and populous State made by a small minority of the voting population. That, I submit, is a political factor and a political portent of far-reaching significance. I know the answer. It is said that the remainder of the voting population might have voted had it wished to do so. True; but why then should not this great nonvoting mass be counted in opposition to revolutionary changes in government rather than in favor of them, or ignored entirely? What principle of political science or of equity is it that puts the institutions of a whole State at the mercy, not even of a temporary majority, but of a small minority of the people?

This election in California wrote into the constitution of the State what is known as the recall, including the recall of members of the judiciary. The recall of executive and legislative officials is not a violation of the fundamental principles of representative government as are the initiative and referendum. It is simply a stupid and a foolish device of restless and meddling minds. The recall, will however, assist the initiative and the referendum in diminishing the consistency, the intelligence, and the disinterestedness of government, because it will help to keep high minded and independent men from accepting nomination and election to public office. It will help to develop a class of



timorous and unprincipled office seekers and officeholders who will be able to change what they call their principles as quickly as they change their clothes, if a few votes are to be gained thereby.

The principle of the recall when applied to the judiciary, however, is much more than a piece of stupid folly. It is an outrage of the first magnitude! It is said: "Are not the judges the servants of the people? Do not the people choose them directly or indirectly, and should not the people be able to terminate their services at will?" To these questions I answer flatly, No! The judges stand in a wholly different relation to the people from executive and legislative officials. The judges are primarily the servants not of the people, but of the law. It is their duty to interpret the law as it is, and to hold the law-making bodies to their constitutional limitations, not to express their own personal opinions on matters of public policy. It is true that the people make the law, but they do not make it all at once. Our system of common law has come down to us from ancient days, slowly broadening from precedent to precedent. It is not a dead or a fixed thing. It is capable of movement, of life, and of adaptation to changing conditions. But it must be changed and adapted by reasonable and legal means and methods and not by shouting or by tumult. It was no less a person than Daniel Webster who said "that our American mode of government does not draw any power from tumultuous assemblages." This is true whether the tumultuous assemblage shouts and cries aloud on a sand lot, or whether the tumultuous assemblage goes through the form of voting at the polls.

Moreover, we know something about what happens when judges are dependent upon the power that creates them. The history of England tells a plain story of the tyranny and injustice which grow out of a judiciary that is made representative not of the law but of the Crown. In the same way, if the recall of the judiciary should be established in this country, it would not be long before our history would tell the story of the tyranny and injustice that usually follow upon a judiciary made immediately dependent upon a voting population. If great causes, civil and criminal, are to be decided in accordance with established principles of law and equity and upon carefully tested evidence, they must be decided under the guidance of a fearless and independent judiciary. To make the actions or the words of a judge the subject matter of popular revision at the polls with a view to displacing a judicial officer because some act or word is not at the moment popular, is the most monstrous perversion of republican institutions and of the principles of true democracy that has yet been proposed anywhere or by anybody.

There need be no doubt or mistake about this, for the advocates of the recall of the judiciary mince no words. I find in the *Appeal to Reason*, edited by Eugene V. Debs, who is hardly the safest and the sanest adviser that the American people have had, these words in relation to the California election:

"The fight at the polls this fall will center around the adoption of the initiative, referendum, and recall amendments to the constitution. Under the provisions of the recall amendment the judges of the Supreme Court of California can be retired. These are men who will decide the fate of the kidnapped workers! Don't you see what it means, comrades, to have in the hands of an intelligent, militant working class the political power to recall the present capitalist judges and put on the bench our own men? Was there ever such an opportunity for effective work? No; not since socialism first raised its crimson banner on the shores of Morgan's country! The election for governor and State officers of California does not occur till 1914. But with the recall at our command we can put our own men in office without waiting for a regular election!"

It will be observed that the courts of California had before them a case about which Mr. Debs had seemingly made up his mind. He had not heard the evidence, because the case has not yet come to trial, but it is perfectly obvious that he and his friends are ready to return a verdict. Moreover, they are ready to recall—that is, to displace—before the expiry of his term any judge who differs with them. Can anyone outside of Bedlam support a public policy such as this?

To make it possible to displace public officials before the expiry of the term for which they are chosen is to deprive them of individual responsibility and dignity and to make them mere tools of passing opinion. It is not difficult to see what would have happened had the principle of the recall prevailed throughout American history. We Americans are singularly liable to communicable political diseases, and one wave of emotion after another sweeps over us with amazing celerity. George Washington would have been recalled at the time of the Genet episode; James Madison might have been recalled during the agitation which led to the War of 1812 with England; Abraham Lincoln would almost certainly have been recalled in the dark days of 1862 and 1863; Grover Cleveland would have been recalled by overwhelming vote in the summer of 1893, when he was making his fight for a sound financial policy and system. Yet, when we get far enough away from the public deeds of these strong men we see that the particular things which at the time most excited the animosity and roused the passions of large numbers of people were the very things that made them immortal in American history. It is not because they defied public opinion that they were great; it is because they understood real public opinion better than did the untamed passion of the moment. They saw far more clearly than did the crowd what was really at stake, and it was their responsibility to reflect, to plan, and to act so that the honor and highest interests of the Nation would be preserved. To-day these men are with the highest on the list of our American heroes; yet every one of them might have been dashed from his high place if the passions of the moment could have gotten at them when those passions were at their height.

Mr. President, neither is there anything new about all this. It is a French proverb which says "Everything changes, but everything is always the same." In 1890 there was discovered the lost work by the philosopher Aristotle on the Constitution of Athens. The reading of that work tells us much more than we previously knew of the working of the Athenian constitution. We can now see more clearly than ever before why it was that Athens, with all its glory, went to pieces. The Athenians not only appointed their generals by popular vote, but they voted every month or two as to whether they would recall them. They recalled Pericles; they recalled Laches; they recalled Thucydides; they recalled Alcibiades. A general would be sent out to take a fort or to reduce a city. He did not succeed. As soon as the news reached home he was recalled. A general was sent out to land an army in Sicily. Before he reached there he was recalled. This sort of thing has all been tried. It was tried at Athens to the full, and the Athenian democracy is now an interesting and instructive memory. Why must we Americans always be children? Why must we always seek to learn over again at our own cost the lessons of experience which the world's history is ready to teach us for the asking?

Mr. President, why should we not be permitted to perfect our form of government instead of changing it? Why should we not move forward in genuine progress on the lines of the development of the last 500 years? Why must we turn back and begin all over again to climb the painful hill of difficulty which leads to representative government and to liberty? It is to me a continual source of amazement that those who urge these revolutionary changes upon

us do not seem to know anything of the recorded history of government and of human society. They do not appear to know that the instruments which they offer us as new and bright and helpful have long since been discarded as old and rusty and outworn. Let them open their minds and study history before attempting to guide the political development of the American people.

I have no time now to do more than indicate where I believe the path of true political progress for our democracy leads. It leads, in my judgment, not to more frequent elections but to fewer elections; it leads not to more elective officers, but to fewer; it leads not to more direct popular interference with representative institutions, but to less; it leads to a political practice in which a few important officers are chosen for relatively long terms of service, given much power and responsibility, and then are held to strict accountability therefor; it leads not to more legislation, but to infinitely less; it leads to fixing public opinion on questions of vital principle and not to dissipating it among a thousand matters of petty administrative detail; it leads to those acts and policies that will increase the desire and interest of public-spirited men to hold office and not drive them away from it as with a scourge.

I wish that it might be possible for us to be lifted up to a distant planet and to look down on this earth of ours and to witness its history move forward as in a cinematograph, so that we might in a few moments view it from its beginnings to our own day. We should see the early civilized peoples with their institutions and their magnificent buildings ruling the plains of Iran; we should see the fertile Valley of the Nile settled and built up and the mysterious pyramids and sphinxes and temples rise like magic at the edge of the most arid of deserts; we should see the grandeur that was Greece, and the glory that was Rome; we should see the building up of the great empire of Charlemagne; we should watch it fall to pieces; we should observe the moving masses of people from the north and east going to the south and west, and also the dark stream of Arab migration flowing along the south shore of the Mediterranean and across the narrow straits into Spain; we should see the modern nations of Europe take their beginning; we should see the heavy hand of absolutism laid upon them, each and all; and then our eyes would be attracted by those two bright spots of which I have already spoken, England and Holland. From them would be seen coming bright beams of light, inspiration, and guidance, strong enough to reach across the Atlantic and to help the earliest American settlers to lay the foundations of the civil government which is ours. We should see the fundamental principles of this polity growing stronger and more powerful, adapting themselves to varying needs and economic conditions, building up a nation that stretches from ocean to ocean and from frost to continual sunshine, and which offers a haven and a resting place to men of every race and every blood who believe in liberty and who seek it. I wish that we could see all that. I wish that we could see the history of political progress as it is recorded in the institutions of civilized men, and seeing it, then put to the American people the question, Why should we change our form of government?

When that vision is revealed to the intelligent American, when his intelligence and conscience are really reached, he will say to these revolutionists who are inviting us to the happy days of the socialistic democracy, No! He will say to the defenders of a representative republic, Let us not change our form of government; let us develop, let us perfect it, for in so doing we are only responding to the noble appeal of Abraham Lincoln, so to dedicate ourselves to the cause of liberty that "government of the people, by the people, and for the people shall not perish from the earth."

# WHAT IS PROGRESS IN POLITICS?

BY

Nicholas Murray Butler



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# WHAT IS PROGRESS IN POLITICS?

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By NICHOLAS MURRAY BUTLER.

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For some time past it has not been easy to discuss politics from the standpoint of principle in the United States. For nearly twenty years two powerful and interesting personalities have dominated the imagination of large elements of the American people. Since the generation passed from the stage to whose lot it fell to settle for good or for ill the issues growing out of the Civil War, Mr. Bryan and Mr. Roosevelt have been the center points of American political discussion. These two attractive men have much in common, as well as many points of difference. The important fact is that when either of them is before the electorate as a candidate for high office, it is almost impossible to secure discussion of any political proposal save with reference to his personality. The effect of this limitation upon our political life has not been happy. Passionate feeling has been aroused at a time when cool reason was most necessary, and blind personal advocacy or blind personal antagonism has taken the place of statesmanlike examination of principles and of policies. At the moment we are at rest in a political eddy. The glamor of candidacies and the rapidly succeeding turmoil of primaries, conventions, and elections is over for the time being. There is given opportunity, therefore, to discuss some fundamental questions of politics apart from their relation to any party, to any candidate, or to any personality.

It is high time that the American people undertook this task without either passion or partisanship, and with sincerity. Conditions are not favorable to national safety and stability if we pursue a policy of drifting, or if we permit specific proposals, in themselves attractive, to lead us away from sound principle. The American people are by nature, by temperament, and by opportunity a people of constant and continuing progress. They have never stood still or gone backward in the past, and it is highly unlikely that they will so far change their nature as to stand still or go backward in the near future.

We are constantly called upon to make progress, to move forward, and to adopt policies and to support measures in the name of advance. Before taking an attitude toward such invitations and proposals, it is advisable to assure ourselves that we know the points of the political compass, and that we are certain of the direction in which we are moving. For whether a man is progressing or not depends not upon whether he is in motion and the label that he

bears, but entirely upon the direction in which he is facing when he begins to move. An avalanche roaring down the side of a mountain in obedience to the law of gravitation is not moving upward simply because it carries with it a signpost marked "Excelsior."

I should describe progress in politics as moving forward to the consideration and solution of new problems with intelligence and sympathy, and in the full light of experience gained and principles established in the past. Change, on the other hand, which many persons mistake for progress, is the mere restless and ill-considered disturbance of conditions with little or no regard to the teachings of experience. Progress in politics will aim to make government just, efficient, and quickly responsive to the public will, and to insure, so far as may be, equality of opportunity, together with security in the possessions of the fruits of one's own brain and hands.

For some time past political progress has been urged upon us and illustrated—indeed, it has almost been defined—in terms of attack upon two very fundamental and far-reaching political principles that are said to be outworn and harmful. If those who so illustrate and exemplify progress are correct, then it is clear that nothing short of a revolution is soon to be effected in our American life, and through it in the world at large. If, on the other hand, they are wrong, as I am profoundly convinced is the case, then progress will lie not in the direction toward which they point, but rather in orderly, reasoned, and permanent advance along the familiar lines of political evolution without disturbing the principles that they attack, without tearing up anything by the roots, without overturning any long-established and beneficent institution, and without sapping the wellsprings of intellectual and moral independence and responsibility by leading the individual to look to the community, rather than to his own efforts, for support.

The two fundamental and far-reaching principles to which I refer are, first, the limitations of a written constitution, and, second, the relation that has hitherto existed in America between the individual and the state. We have been lately been told in no uncertain terms that political progress consists in throwing off the shackles of a written constitution and in wholly altering the relation that has hitherto existed between the individual and the state. These appeals are not unfamiliar in other parts of the world, but to large numbers of thoughtful Americans they have a strange and somber sound. They are nothing short of a challenge to the justice and wisdom of the basis on which our entire civilization rests, whether those who make them realize this or not. We must look carefully into these two contentions, and, if we can, meet and refute them with rational argument and with historical illustration. If we can not do this, then we must, as thinking men, accept these new policies, however revolutionary they may seem to us to be.

What is a written constitution? What are its limitations and its shackles? A written constitution is nothing more than a court of appeal to man's sober and historically justified reason from his quick acting and present impulses and passions. A written constitution simply marks out and defines what has already been accomplished in the progress toward free government, and drives a stake, as it were, in order that we may return to it for guidance when we need to take a new measurement.



Nevertheless, for some time past impatience of a written constitution has been marked in this country in many places and in many ways. We have been told that our written Constitution attempted to bind us fast to an eighteenth-century view of society, and that it could not possibly adapt itself or be adapted to present-day needs and problems. It is one manifestation of this impatience when judges, who have taken a solemn oath to obey and enforce the Constitution and its limitations, are told from the platform and in the press that they should read into it some new and strange interpretation which a portion of the population honestly believe is necessary to the satisfaction of their ethical ideals or their social impulses. The same tendency is manifested when it is proposed to recall judges from their high positions, not because of any personal offense justifying impeachment, but because of their failure in official act to harmonize with some strongly held present-day opinion. Precisely the same temper is shown when it is proposed that the people at large shall by a plenary and direct exercise of the police power overturn a judicial decision which puts a constitutional barrier to some much-desired policy or act.

There would be justification for even the most extreme of these proposals if our written Constitution were unamendable; if it were really a strait-jacket into which our national life was long ago forced, and which could only be worn in these later days with harm and constant pain. But the contrary is the case. The Constitution is readily amendable whenever a large body of opinion, widely distributed throughout the country, genuinely desires its amendment. We are witnessing at the moment two illustrations of this fact. The amendment authorizing the levying of a Federal income tax is well on its way to adoption, and will almost certainly become the sixteenth amendment to the Constitution within a few weeks. The proposal for the direct election of United States Senators has been adopted by the constitutional majority in both the House of Representatives and the Senate, and it is perfectly plain to every political observer that it will have no difficulty in securing ratification by the legislatures of the States. Here are two important amendments to our fundamental law, at least one of which may prove to be very far-reaching in its effects and to involve consequences not now foreseen; and yet, when public opinion has really and unmistakably asserted itself in their support, they go forward with but slight interruption or delay to take their place in the Constitution of the United States.

The whole history of the Constitution illustrates this. By far the greater part of the hundreds of amendments that have been proposed from time to time, some of which have received a considerable measure of support, have failed to secure incorporation in the fundamental law because the great mass of the American people were not interested in them or did not believe them to be important. On the other hand, the first ten amendments were speedily adopted in order to set at rest certain doubts and difficulties that had arisen in the public mind at the time of the ratification of the Constitution itself. The eleventh amendment was adopted—not, I think, wisely—to give effect to an interpretation of the Constitution other than that which had been held by the United States Supreme Court in the well-known case of *Chisholm v. Georgia*. This amendment is sometimes pointed to as an illustration of what is meant by the recall of a



judicial decision. This use of it, however, rests upon an entire misconception of the facts. So far from being the recall of a judicial decision, it was a formal amendment to the Constitution in order to meet a general situation which a judicial decision had created. This is something which constitutional government always contemplates, and there is nothing extraordinary or abnormal about it. It is, on the other hand, an orderly, reasoned, and proper way in which to exercise the sovereign power of the people. Despite the feeling that this particular decision created, because it ran counter to the extreme State Rights doctrine of the time, it took nearly four years to secure the adoption of the eleventh amendment. The twelfth amendment, relating to the mode of electing the President and Vice President, was adopted practically by unanimous consent, to remove an obvious difficulty in the working of the original provisions of the Constitution on this point. The history of the thirteenth, fourteenth, and fifteenth amendments is well known, as is the history of those that seem destined to become the sixteenth and seventeenth. The sovereign people of the United States are, then, demonstrably in full possession of their Government, and they have not deprived themselves of the power to alter or amend its fundamental law when they believe such alteration or amendment to be necessary or desirable.

There are two questions that must be carefully distinguished. The one relates to the desirability of amending the Constitution in any specified manner at a given time, and the other relates to the breaking down or overriding of constitutional limitations, whether by executive usurpation or by legislative act, because some considerable body of opinion is ready to applaud the result. In the former case the issue is this: Will the sovereign people consciously and willingly, after consideration and debate, alter their fundamental law? In the latter case the question is this: Will the people permit their Government to be changed and its underlying principles modified by what is in effect and often in form as well a revolutionary act?

There are those who believe and teach that the path of progress lies in the direction of breaking down and overriding constitutional limitations. It is essential to progress that all such proposals be met with a determined opposition. These constitutional limitations on governmental power are in the interest of individual liberty. They themselves mark the history of progress in government. They represent what our ancestors for scores of generations have won, first from the formlessness of anarchy, and later from the tyranny of an individual or a class. The reason why this matter is so important for us is that only in the United States has individual liberty been really made a part of constitutional law. Everywhere else it has only a statutory basis. Germany alone of modern peoples has made progress toward the position of the United States in this fundamental matter; but in Germany the judiciary is dependent upon the political departments of the Government, and, therefore, it lacks authority to protect the individual from encroachments by them. In France and in Great Britain individual liberty depends wholly upon the passing mood of a majority in the legislative assembly or in the House of Commons.

What is at stake in preserving a written constitution and its limitations upon government is nothing less than the sovereignty of the people themselves. In the United States the people are sovereign.

The Constitution as from time to time amended sets up the people's form of government and defines the functions and limitations of its various officers and agencies. The Government has no authority but that which the sovereign people choose to intrust to it, and an independent judiciary is established by the people in order to make sure that the executive and the legislative departments of the Government do not overstep their respective limitations. If these limitations on government be removed or nullified, or if the independent judiciary be deprived of its independence, the effect will be to transfer sovereignty from the people of the United States to the governmental organs and agencies for the time being. Without constitutional limitations, the Congress of the United States would be as sovereign as is the House of Commons, and all those precious privileges and immunities that are set out in the Constitution and its amendments, and as to which the individual citizen may appeal to the judiciary for protection, would be placed upon the same plane as a statute authorizing the appointment of an interstate commerce commission or one denouncing a monopoly or other act in restraint of trade. It must not be forgotten that there is no such thing as an unconstitutional law in Great Britain. The fact that the Parliament enacts a law makes it constitutional, no matter what its effect upon life, liberty, or property may be; for Parliament is sovereign. To propose to import this condition into the United States is not progress, but reaction.

It may be asked, what difference does it make in everyday life whether the sovereignty remains with the people of the United States, and whether the Congress and the several legislatures are held to the performance of their tasks under those limitations and restrictions which the people have in their constitution laid upon them, or whether those restrictions and limitations are removed and the sovereignty as you say passes to the legislative body itself? The answer is this: Any majority, however small, however fleeting, however unreasonable, or however incoherent, would then have at its immediate disposal the life, liberty, and property of each individual citizen of the United States. This may be a good form of government, but it is certainly not the American form. It is not that republican form of government which the people of the United States have guaranteed to the several States. It is a return to tyranny, with a many-headed majority in the place of power once held by the single despot. This again is not progress, but reaction. It is a proposal to undo what history has so effectively done; to give back to the mass what has been so painfully conquered for the individual; to alter absolutely and for the worse our standards of judgment and of accomplishment in public affairs. The harassing of individuals and of minorities is sometimes unavoidable in the processes of government, but it is neither wise nor necessary to exalt it to the position of a controlling principle.

By a curious perversion of clear thinking, this issue is sometimes stated to be one between those who believe that the people are wise enough and strong enough to carry on a government of comprehensive powers, and those who believe that they are not. It is described as an issue between those who trust the people and those who distrust the people. Nothing could be further from the fact. Those who trust the people are the ones who believe in individual

liberty, who have confidence that a man can work out his own fortune and build his own character better than anyone else can work it out or build it for him. Those who distrust the people are the ones who wish to regulate their every act, to limit their gains and their accomplishments, and to force by the strong arm of government an artificial and superficial equality as a substitute for that equal opportunity which is liberty. There could be no greater evidence of hopelessly confused thinking than to suppose that a government of limited powers is so limited because the people distrust themselves. The fact is precisely the opposite. To trust the people is to leave them in fullest possible possession of their liberty and to call upon them to use that liberty and its fruits for the public good.

The second fundamental and far-reaching principle that is under attack in the mistaken name of progress is that which governs the relation of the individual to the community or state. This principle is closely bound up with a written constitution and its limitations on the power of government, and the two really stand or fall together.

There are three broadly distinguished ways in which the relation of the individual to the community may be viewed. We may, in the first place, look upon the individual as everything and the community as nothing. In that case each individual becomes an end unto himself, and what we call civilization is reduced to a predatory war in which the remainder of mankind are the enemies of each individual. More than once in the history of human thinking doctrinaires have expounded this view and have exalted it as desirable. They have not, fortunately, been able to secure enough support to put their doctrine into practice over a wide area or for any considerable time.

We may, in the second place, look upon the individual as nothing and the community as everything. In one form or another this is the doctrine which underlies the civilization of the Orient. In the East, either by ancestor worship, by caste feeling, or by religious doctrine, whole masses of population have been held in subjection for centuries; for the controlling principle of life forbade an individual to assert his independence of the thought of the community of which he was a part.

If anarchy be the result of the first of these views, stagnation is the result of the second. The western peoples from the time of the Greeks have endeavored to avoid both anarchy and stagnation by adopting and acting upon a third point of view. This point of view, in contradistinction to individualism on the one hand and to communism on the other, I call institutionalism, for the reason that it looks upon the individual as finding his highest purpose not in antagonizing his interests to those of his fellows, but in using his freedom and his power of initiative to help them build and maintain the institutions that are civilization. This is a view that lays great stress upon individuality, upon personal liberty, and upon personal character, but that sees liberty and character perfected and manifested in the free and willing service of the community and in those civil institutions which exemplify this service and aid it. This view differs sharply from that first described in that, while it emphasizes the individual, it yet regards him as a member of a group, a community, a society, in which he has duties and owes service as well as possesses rights and privileges. It differs from the second view in that it calls upon the individual to serve his fellow men

willingly and out of conscience and good judgment, instead of reducing him by an external force to a uniform level of action and of belief.

There is no progress in politics in breaking down this third view of the relation between the individual and the community in favor of either the first or the second. The road that leads to that individualism which is anarchy is not one of progress. The road that leads to that communism which is stagnation is not one of progress. We have been walking in the path of progress for 2,500 years, and the characteristic of that path is that it leads every individual to exert himself to the utmost, not alone that he may profit, but that he may be the better able to serve. The American people will not be wise if they fail to test every proposal made in the name of progress by this standard. Does it tend to exalt the individual at the expense of the community in a way that makes for privilege, monopoly, anarchy? If so, reject it. Does it tend to exalt the community at the expense of the individual in the way that makes for artificial equality, denial of initiative, stagnation? If so, reject it. Does it tend to call out the individual constantly to improve himself for wider and more effective service and good citizenship? If so, adopt it. It makes for progress.

If this analysis of underlying principles is correct—and I submit it with confidence to the judgment of thoughtful and unprejudiced Americans of whatever party—then we must hold fast in any program of advance to a written constitution, with definite and precise limitations on government in the interest of liberty, which constitution is not to be overridden and ignored, but which may be amended in orderly fashion when public opinion demands; and also to a political policy which both in general and in detail will offer new and increasing opportunities to the individual, not primarily for his own aggrandizement, but for the public and general good.

Before passing from these questions of fundamental principle to some matters of detail, let me say a word as to the influence of the two-party system in effecting political progress. The parliamentary history of Great Britain and of the United States demonstrates that free government will progress most rapidly and most equitably if it is conducted under a system in which two political parties, differing sharply on some fundamental principle of government, stand over against each other as opponents and as critics. The constructive power of the nation will at times be represented more strongly in the one party, and at times more strongly in the other. But their honest, sincere and straightforward criticism of each other's principles and policies, and their division of the community into two parties, each of which includes representatives of every class and type of citizenship, has in it far more of hope, far more promise of advance, and far more of democracy than has a series of temporary legislative majorities made up by a combination of rival groups, each representing a class interest and struggling not for principle, but for advantage. There is no progress to be had by the multiplication of parties or by introducing here the system of political groups, which has made so difficult the advance of parliamentary institutions on the continent of Europe, and which has at time so paralyzed the arm of effective government. The Labor Party in Great Britain has greatly complicated the problems of government without materially advancing the cause of its



own members, for the reason that it represents not a principle, but an interest in politics. The triumph of a combination of interests is more to be feared and deplored than the victory of an unsound principle. The latter can often be undone; the former rarely, and only after long tribulation. We should strive to strengthen, rather than to weaken, the party system which divides society by a perpendicular line running through all classes alike, and we should resist the substitution for it of a number of special groups and class interests that divide society horizontally.

What, now, are some of the real problems that are pressing for solution and whose satisfactory handling, without departing from sound principle, would constitute genuine progress in our politics? They are very many, and it is impossible to do more than mention the most important of them.

I. It is plain that a large number of persons are dissatisfied with what may be called the stiffness of the framework of our government. They have been induced to believe that representative institutions are not adequate to a just expression of the popular will, and that it is desirable to modify them or to overturn them entirely by going back to the once abandoned methods of direct democracy. It is not difficult to prove that the substitution of direct democracy for representative institutions is and must necessarily be a long step backward. On the other hand, it will be a step in advance to seek out and to remove the causes of dissatisfaction with representative government and the distrust of it that now exist. There are two ways of accomplishing this: One is to make the framework of government somewhat more flexible than now, and the other to simplify and to improve the methods by which public officers are chosen as well as those by which governmental policies are declared and executed.

The provide a less difficult mode of amending the Constitution than that now in force would be to make progress. A quarter century ago it was pointed out<sup>1</sup> that artificially excessive majorities are required to bring about constitutional change. At that time fewer than 3,000,000 people could successfully resist more than 45,000,000 in the attempt to secure an amendment to the Constitution. A safeguard of this kind is extreme, and of itself invites to revolution and violence. So far as the State constitutions are concerned, the process of amendment is already quite easy enough, and if the bad habit of putting into the organic law what are really legislative details could be checked, the wish to amend the State constitutions would be far less frequent than at present. With the Constitution of the United States, however, the case is different. The modification of the amending article has been discussed at various times since it was first proposed by Senator Henderson of Missouri, in connection with the projected Thirteenth Amendment, in 1864. Prof. Burgess, of Columbia University, made an important suggestion on this subject<sup>2</sup> more than 20 years ago, and more recently his suggestion has been modified and presented<sup>3</sup> in a way that deserves careful consideration as a part of any program of political advance.

The suggestion is that, in future, amendments to the Constitution shall be submitted to the States for ratification when passed by a

<sup>1</sup> Burgess: *Political Science and Comparative Constitutional Law*, I: 151.

<sup>2</sup> Burgess: *Political Science and Comparative Constitutional Law*, I: 152-3.

<sup>3</sup> Munroe Smith: *Shall We Make Our Constitution Flexible?* in *North American Review* November, 1911, pp. 657-672.

majority vote of both Houses of Congress in two successive Congresses. When so submitted they shall be voted upon either by the legislatures of the several States or by conventions in each State, or directly by the voters in each of the States, as one or another of these methods of ratification may be proposed by Congress. When so voted upon they shall be ratified whenever accepted by a majority of the States—whether acting through their legislatures or by conventions, or by direct vote of the people, as may have been provided—on condition that the ratifying States also contain a majority of the population of all the States according to the last preceding enumeration. The advantages of this plan for amending the Constitution over that at present in force would be that a minority of one-third in either House of Congress could not withhold indefinitely, as now, the submission of a new constitutional proposal to the States, and that population would be given a due and proper weight in deciding whether or not a particular proposal should be ratified. On the other hand, deliberation and caution would be secured by the provision that a proposal to amend the Constitution must command a majority of both Houses in each of two successive Congresses. This suggestion, which is the result of much careful study, will, I think, commend itself the more closely it is examined as a genuine step in advance through making the framework of the Government more flexible and more responsive to popular opinion, without breaking down any existing safeguard and without violating any fundamental principle.

II. The people as a whole are not satisfied with the present methods of nominating and electing public officers. The widespread movement to dispense with conventions and other intermediate bodies and to nominate all candidates for office by the direct primary is evidence of popular discontent with the methods that have heretofore existed. It is my belief, however, that the rapid development of legislation controlling political party organization and procedure is not a step forward, but rather backward—or perhaps sideways; and that real progress lies in a different direction. I can not agree with those who are urging the State in the name of progress to extend statutory control over party organizations and methods. It would, I believe, be wiser for the State to withdraw entirely from all legislation affecting political parties and their methods other than that which also affects churches, Masonic lodges, chambers of commerce, and other voluntary bodies. The attention of the State government should be fixed on the election, and on the election alone. Of course, in that case there should be no discrimination in favor of political parties in making up the official ballot. Access to the ballot should be open on the same terms to any responsible body of citizens sufficiently numerous to command attention and willing to give some evidence of good faith. The way would then be open for an appeal to the people, on equal terms, by parties other than the two leading ones and by those voters who, not associated with any political party, so often hold the balance of power between parties and exercise a healthy influence upon them. A political party, like a Masonic lodge or a branch of the Christian church or a chamber of commerce, should be left to its own devices and allowed to regulate itself and to manage its own internal affairs as it wills. If the contrary view, which is at present so popular, be

taken, then it may be safely predicted that before many years we shall find ourselves confronting problems arising out of this legal relation between the State and the political parties that will rival in complexity and difficulty those that have already arisen in European countries between the State and the legally recognized churches. The result will be not progress, but reaction.

This is a large and difficult subject, full of points of contention. I must be satisfied for the moment with merely indicating that the course of action which has hitherto been hailed as a mark of progress seems to me to be something quite different.

If the spirit animating a political party is one of justice and wisdom, it will permit its members to give expression to their wishes and preferences in any way that a majority of them desire. The method of the direct primary is doubtless advantageous within relatively small and homogeneous communities, where men know each other and where candidates for office can be discussed with some degree of understanding and personal acquaintance. That it will be highly disadvantageous to substitute the direct primary for the method of the convention and conference when large areas are involved, such as a great State or the Nation as a whole, I am entirely certain. It will, among other things, exalt the professional politician and the man who can provide or secure the great sums of money needed to carry on a campaign for several weeks or months before a large and widely distributed body of electors. True progress will consist in freeing the convention system from abuses, not in abolishing it. To supplement the State and national conventions by a direct expression of the preference of the individual voter is one thing; to do away with such conventions and their great advantages is quite another.

III. Again, the Government will be more quickly responsive to the will of the people if the necessary steps be taken to improve our legislative methods and procedure. As has recently been pointed out with great force by ex-Speaker Wadsworth of New York, many if not most of our laws are loosely drawn and carelessly considered, and in a great number of cases they fail absolutely to accomplish the object desired by those who urge them. These facts of themselves lead to much unnecessary and vexatious litigation, and tend to give ground for the belief that in some way or other the processes of government are used not to carry out, but to defeat, the popular will.

We might with advantage imitate the procedure of the House of Commons in this respect, as it is far superior to our own. The fault in this country does not lie in our system of government, nor does it lie with members of the legislatures as individuals. It is to be found rather in the fact that we have utterly neglected to perfect our methods of legislation. We give little or no attention to the art of bill drafting, and hardly any checks have been provided against the indiscriminate introduction of bills in legislative bodies. When bills are introduced without previous careful revision, and are submitted by the thousand in a single session, it is plain that it is out of the question to secure satisfactory results for the public.

We need, both in connection with the Congress of the United States and in connection with the several State legislatures, commissions of experts to draft bills in accordance with the wishes of those who have a particular proposal to bring forward. It ought not to be possible

for an individual member of a legislature to present bills at random and haphazard at the request of this constituent or that, badly phrased, crudely and verbosely drawn, and utterly unsuited in form and in content to find a place upon the statute book.

IV. We have now had a long experience with the sharp separation of the executive and the legislative powers, and that this separation has some disadvantages is certain. Our governmental policies too often lack continuity and coherence because of it. In many ways the effectiveness and economy of the National Government suffer severely owing to the fact that so often the executive and the legislature act at cross purposes, or on insufficient and inaccurate information, or from a misunderstanding of the motives of each other. This difficulty could be in large measure removed if action were taken, as might easily and constitutionally be done, giving to the members of the President's Cabinet seats upon the floor of the Senate and House of Representatives, with the right to participate in debate upon matters relating to their several departments and with the obligation to answer questions and to give information in response to requests from Senators and Representatives. This is not a new proposal. It is associated chiefly with the name of George H. Pendleton, of Ohio, who brought it forward as long ago as 1864, when he was a Member of the House of Representatives. He was vigorously supported at that time by Mr. Garfield and by Mr. Blaine. Fifteen years later, when Mr. Pendleton was United States Senator from Ohio, he returned to the subject and introduced a bill dealing with the matter, which was referred to a select committee and soon reported favorably over the signature of Senator Pendleton himself, together with those of Senators Allison of Iowa, Voorhees of Indiana, Blaine of Maine, Butler of South Carolina, Ingalls of Kansas, Platt of Connecticut, and Farley of California. Even these important leaders, however, could not accomplish this desirable reform, although they were united in its support. The proposal was renewed again by John D. Long, of Massachusetts, when a Member of the House of Representatives, in 1886. It has recently received the indorsement of President Taft.

That this action would, if taken, greatly increase the efficiency of our Government and bring the executive and the legislative branches into closer understanding of each other's methods and purposes, without in the least trenching upon the independence and authority of either, seems to me quite certain. One of the most valuable features in the business of the House of Commons is the asking by members of the House of specific questions on matters concerning which the public wishes information, or about which some criticism or discussion has arisen. Many a long and useless speech that now extends over pages of the Congressional Record would be saved if a responsible Cabinet officer were at hand to give immediate answer to a definite question, or to offer a statement of fact.

V. There is no reason, save the sheer force of custom, for adhering longer to the present plan of electing a new Congress in November and providing for its first regular session to begin thirteen months afterward. The Congress would be more closely in touch with popular sentiment and more responsive to it, as well as in better mood for constructive legislation, if it were statedly convened within sixty or ninety days of the time when its Members are chosen. As matters are at present, a Member of the House of Representatives



is already concerned with the preliminaries of a campaign for re-election before he has really entered upon the discharge of the duties of his office.

VI. In the Nation we have the principle of the short ballot. It will be a step in advance when we extend this principle to all the States. The State of New Jersey has enjoyed it for many years, and in consequence has one of the best governments of any State in the Union. Where the short ballot is adopted, public interest and attention are centered upon the most important executive and legislative officers, and they are chosen and held responsible for the selection of their associates in the minor offices of government. A large part of the extravagance and maladministration in county government throughout the United States is due to the election by the people of a long list of minor officials who have no common sense of responsibility and no common purpose. We need the short ballot in the State and in the county as we already have it in the Nation and are rapidly getting it in the municipalities.

Here, then, are six important steps forward waiting to be taken: A more flexible method of amending the Constitution of the United States; a more satisfactory way of nominating and electing public officers; improvement in legislative methods and procedure; giving to members of the President's Cabinet seats on the floor of both Houses of Congress, with the right to participate in debates concerning their several departments; beginning the regular session of Congress at a point much nearer to the election of its Members than now; and the extension of the principle of the short ballot.

Some of these reforms relate to the National Government alone, while others affect both the Government of the Nation and that of the States. It can hardly be doubted that the cumulative effect of the adoption of all six proposals would be greatly to improve the work of our governmental system as a whole, and to allay a large part of the dissatisfaction with it that now exists.

Given these improvements, then concrete problems of legislation and administration may be attacked with greater hope of success and satisfaction. We should not delay even a month in trying to secure a modern and scientific system of banking and currency without waiting for the lessons of another money panic. We should labor to bring greater economy into the field of public expenditure, and to weigh carefully the effect upon the cost of living of governmental extravagance and the constant creation of huge volumes of bonded indebtedness.

We should support the businesslike recommendation of President Taft for the formulation of an annual national budget, that some semblance of order may be brought into the present chaos of national appropriation and expenditure. We should follow the suggestions of the American Bar Association and other important authorities, to the end that undue delay in judicial procedure may be avoided and that numerous and costly appeals, particularly when based on technical points, may be reduced so far as is consistent with strict justice. We should consider with an open mind whether the effect is good or ill of depending so largely as we do upon indirect taxation, and whether if more direct taxes are to be levied, they should not be levied with the lowest possible limit of exemption, in order to bring the cost of government home to substantially the entire electorate. We should push

forward along the road already traveled by the National Government and by many States toward the improvement of social conditions and the betterment of those who are forced to live on the very margin of want. We should plan vigorously and wisely for the prevention, and not alone for the cure, of the many difficulties and injustices now existing in society, and do so in a spirit that will not lead the individual to lean more heavily upon the community, but rather help him to stand yet more surely and confidently upon his own feet. We should aim not to bring the Government into partnership with monopoly and privilege, but in all our legislation affecting these matters, whether in the State or in the Nation, to keep open the channels both of competition and of useful combination by preventing monopoly on the one hand and by punishing specifically unfair and dishonorable business practices on the other. We have, fortunately, learned as a people the meaning of the words "the conservation of our natural resources," and it is the policy of progress to go forward systematically and intelligently with the course that has already been adopted. We should refrain always and under whatever temptation from a policy of international bravado and swagger, and should yield nothing, whether by careless act or by considered policy, of the leadership that we have gained in promoting the cause of international peace and the judicial settlement of disputes between the civilized nations.

All these matters and a score more suggest themselves to the eager American mind bent on high achievement and securing the just working of government for noble ends. A government must first of all make certain its own security and stability. It must then labor to advance the national ideal and at the same time strive to take an honorable part in the life and aspirations of the world as a whole.

In such ways as these lies the path of true progress in politics. That path is not to be found amid the morasses of discontent, of class feeling, of the grasping for privilege and monopoly, or by making the individual lean constantly more heavily upon the community for maintenance and support. It is to be found rather out on the clear and sunlit heights of individual opportunity, where a fair chance is given to every man to stand erect and to do a man's work in the world, knowing that thereby he is serving the state and helping to build civilization on a yet securer basis.

For my own part, I should like to be able to say of the political party in whose tenets I believe, and to which I am glad to belong, what Robert Lowe said of the Liberal Party in Great Britain in the dark days of 1878, when its prestige seemed fatally broken and its long-time power trampled under foot by the triumphant opposition:

The ideal of the Liberal Party—

Said Robert Lowe—

consists in a view of things undisturbed and undistorted by the promptings of interest or prejudice, in a complete independence of all class interests, and in relying for its success on the better feelings and higher intelligence of mankind.

"Happier words," said Matthew Arnold of this passage, "could not well be found."

Two years later the Liberal Party, pursuing this ideal, was returned to power under the leadership of William E. Gladstone.





# THE COURTS AND THE CONSTITUTION

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AN ADDRESS

BY

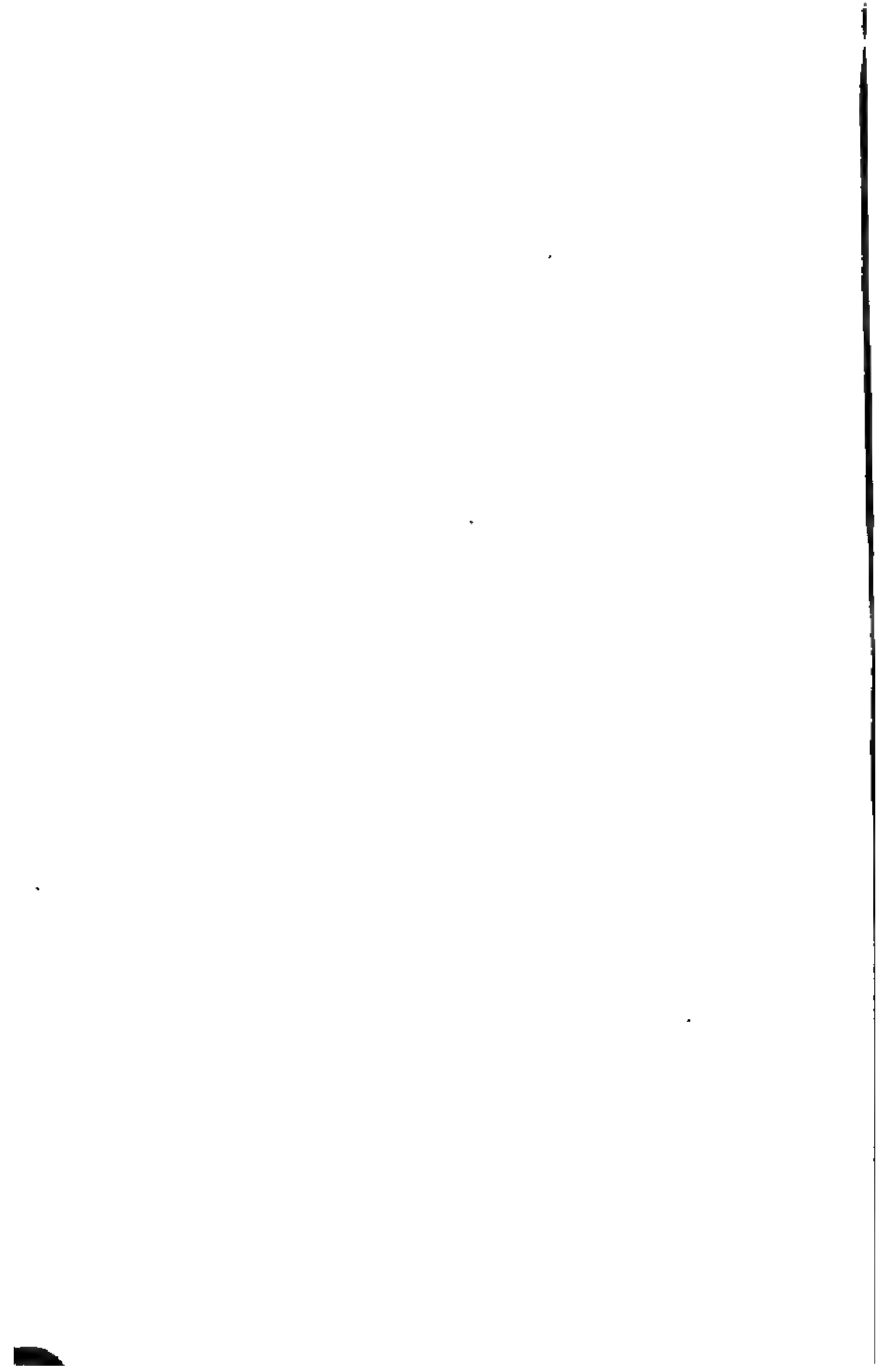
HON. GEORGE SUTHERLAND

SENATOR FROM UTAH

BEFORE THE AMERICAN BAR ASSOCIA-  
TION, AT MILWAUKEE, WIS.  
AUGUST 28, 1912



PRESENTED BY MR. LODGE  
DECEMBER 6, 1912.—Ordered to be printed



# THE COURTS AND THE CONSTITUTION.<sup>1</sup>

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GENTLEMEN OF THE AMERICAN BAR ASSOCIATION:

It is becoming unfashionable to speak well of the Constitution. It is no longer respectable to profess the ancient faith in the learning and integrity of the courts. There is abroad in the land a new political propaganda whose teaching suggests that the written Constitution is binding only upon the minority and that its meaning may be ascertained more accurately by inspecting the casual contents of the ballot box than by invoking the trained and deliberate judgment of the bench. The lessons of the fathers and of history are being rapidly and contemptuously consigned to the limbo of ancient and discredited superstitions. The past is useful only in so far as it teaches us what to avoid. Doctrines and laws are right in proportion as they are novel. The desirability of the thing proposed is measured by the extent it differs from things as they are. Experiment is more highly regarded than demonstration, and prediction is exalted above experience. Whosoever advocates old methods or old institutions, however well proven and long continued, is suspected of having engaged in the nefarious enterprise of working a confidence game upon a virtuous and progressive population.

There is a growing sentiment that the Constitution has become obsolete and that its provisions stand in the way of reforms which are demanded by the people, a sentiment which, if it runs unchecked, must result in the serious impairment if not the disastrous overthrow of our institutions and their orderly and wisely progressive administration. Many of us do not believe that the Constitution has been outworn or that it has become a dead wall in the path of progress, to be assaulted and overthrown before we can move on. Its principles are living forces, as vital now as when they were adopted. It is not and never has been a wall, but a wide, free-flowing stream, within whose ample banks every needed and wholesome reform may be launched and carried.

The overshadowing and sinister menace to the American social structure to-day is the newly developed tendency in the direction of breaking down the organic consciousness of the people. There is a lessening of the old sense of loyalty to the integrating and balancing agencies of our Government which we have ourselves created and which are so essential to our orderly existence. If this tendency shall go forward increasingly, disaster must inevitably result, for an aggregation of individuals can no more escape the consequences which follow a violated law of their being than can the single individual. In both cases the penalty for excising the vital organs is death and

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dissolution. In the political body the vital organs are the legislative, the executive, and the judicial departments. The functions of government committed to these organic institutions can no more be carried on successfully by society *en masse* than the functions of the human body can be discharged inorganically.

The framers of the Federal Constitution were deeply learned in the science and history of government. They knew the advantages of democratic institutions, but they saw with clear vision the weaknesses and the dangers which must be guarded against if government by the people was to be just and enduring. They knew that a *pure* democracy was a beautiful but a barren and deceptive idealism which had never survived, and in the nature of things could never survive, the test of practical experience, since it constitutes an attempt to carry on the complex functions of the social organism without the necessary and appropriate organs. They realized that for the 3,000,000 people of their day (*as a fortiori*, for the 90,000,000 of our day) to undertake by direct action the making of laws, the interpreting of laws, and the executing of laws would be to substitute for the orderly and despotic rule of the king the spasmodic and often no less despotic rule of the fluctuating majority. The voice of the people may be the voice of God, but neither God nor the people at all times speak through the lips of the major portion of the people. The problem which faced the framers was that of devising a form of government by which the sober and deliberate will of the people might be effectuated without at the same time becoming the mere mechanical and helpless register of the passing whims and caprices and fleeting emotions of the constantly changing numerical majority.

By the Constitution they therefore established a *representative republic*—a *self-limited* democracy as distinguished from an *unlimited* democracy. They provided for the three separate and distinct departments, conferring upon each its appropriate powers, and thereby denying to each any authority to invade the domain of the others. So delicate and yet so strong was the adjustment that the plan has operated with justice and efficiency for more than a century of unchallenged time.

The average citizen, except in periods of stress, has been scarcely aware of the existence of these three great governmental agencies. Until recent years it seems never to have occurred to him that direct participation on his part in the framing of laws, the recall of judges, or the revision of judicial decisions was a fundamental or valuable right of which he was being unjustly deprived. He has lived in peace under his own vine and fig tree, in the secure and unmolested possession of his property, pursuing in his own way the enjoyment of life, liberty, and happiness, subject to only such restraints as would enable others to do the same.

But all at once the call has gone forth for the people to take possession of the machinery of government and by direct action perform the difficult and complicated functions of making, construing, and executing laws. The good faith of the people themselves in seeking these radical changes is not to be questioned, but we may justly doubt their wisdom in having lent a too ready ear to the professional demagogue whose strident voice has filled the land with his ill-considered and impractical theories.



If the vast majority of mankind had not earnestly desired that their dealings with one another should be characterized by the principles of justice, organized society would never have emerged from savagery, and the persistent and upward march of civilization toward better things would have long since ended in the final submersion of humanity in universal and permanent barbarism. The popular movements of the civilized races have always been characterized by sincerity of purpose, though they have not always been attended by wisdom or by certainty of accomplishment. They have sometimes followed paths that ended in the thickets of error, but always the search has been for the *way* of righteousness; and holding fast to the things that have been proven and profiting by their mistakes, they have gone steadily onward to higher and still higher levels of development, advancing quite as much by the sturdy retention of old truths as by the discovery and application of new ones.

There can never be any real contention between those who advocate doing well and those who consciously advocate doing ill. In the constantly increasing complexity of our mutual relations, the task which in a multitude of forms continually confronts the people as a whole consists not so much in the doing of proven and accepted right as it does in the ascertainment of what is right. Under primitive conditions this problem was comparatively simple because all the social relations were simple, but modern society is so vast and so complex, that the sharp line which divides indisputable right from undoubted wrong has become relatively shortened, while beyond stretches the constantly lengthening and broadening zone of debatable territory. Within this zone there is much uncertainty and occasional confusion. We learn to distinguish what is wise and righteous from what is wrong and foolish by experience which compels our assent rather than by precept, which only advises our understanding. This experience in England has been preserved in the common law and the unwritten constitution. For many centuries the English people slowly advanced from primitive affairs and conditions to large and complicated affairs and conditions, solving the problems of each generation as the need arose, and by the light of experience molding by evolutionary rather than by revolutionary methods the fundamental principles of law and government into appropriate form, until by slow degrees they have become embodied by tradition and inheritance in the very structure of their political institutions.

The United States, however, came into existence not by measured and gradual evolutionary development, but by the creative fiat of revolution. At the same time that our people declared a nation they were confronted with the necessity of framing a government. Having no governmental establishment as the result of historic growth, they were obliged to make one by an act of construction. With no traditional constitution, they were compelled to adopt their fundamental law by written compact, by which they agreed that not only their several governmental agencies—the executive, legislative, and judicial departments—should be governed, but themselves in their dealings with one another should be bound, thus entering into a solemn covenant of all the people, which rightfully can no more be broken by the most powerful or numerous majority than by the meanest or weakest individual.



And since human judgment is fallible and written language capable of misunderstanding and perversion, it is manifest that in case of dispute between parties to the compact as to its scope and meaning the determinative construction can not wisely be left to even the majority of the parties, for that would be to make the majority the judge in its own case and put the minority at the mercy of a tribunal whose determination, however wrong, could not be reviewed and corrected, and however right, would not meet with the willing acquiescence of the minority. Hence the need of authoritative umpires in case of dispute, and hence courts and judges.

The last decade of our history has witnessed the advent of certain amiable but restless gentlemen who have employed their talents in an effort to persuade themselves that the Constitution stands in the way of social and moral advancement. They have made rather slight inquiry as to their probable destination, but they are anxious to be on the way and are impatient at the obstacles which they fancy that discredited document presents to an immediate start. They do not always seem to realize that while progress involves change, change does not always mean progress, and a disposition to treat the two terms as convertible has led to more or less intellectual confusion.

There stands in Paris at a point where several of the superb avenues of that city radiate like the points of a star a stately and imposing structure called the Arch of Triumph. There are two methods by which the descent from the summit may be made, namely, by going slowly and laboriously down the stairway or utilizing the force of gravitation by jumping from the parapet. On a certain occasion a few years ago 10 or a dozen men were standing at the top of that famous monument. All but one of them, being commonplace people, descended in the old fashioned, orthodox way, but that one, a gentleman of advanced views who had charmed the others by the brilliancy of his conversation and the boldness and originality of his speculations, came down by the alternative route, with the result that on the following afternoon he was laid away in the cemetery attached to the lunatic asylum from which he had escaped. The incident carries with it a lesson which I commend to the thoughtful consideration of the impatient reformers of these days, which is that to follow the constitutional stairway step by step may be a slow and tiresome process, but it at least assures us of a safe arrival.

The chief value of the written Constitution, with its comprehensive system of checks and balances, is that it operates to prevent ill-considered and impulsive action—affords a period for sober reflection—but whenever the people have deliberately determined upon a step of real progress it will be found that the Constitution as interpreted by the courts rarely presents an obstruction, and in that rare and occasional instance it will be far better to reach the desired result by the slow process of amendment than by the drastic and dangerous expedient of constitutional violation.

The spirit of impatience to which I have referred finds a most unfortunate manifestation in the intemperate and frequent denunciation of the action of the courts in declaring to be unconstitutional statutes which have been passed by Congress or State legislatures in response to popular demand. Notwithstanding the fact that the recognized judicial doctrine for more than a century has been that the courts in cases properly before them have power to decide whether

an act of legislation is opposed to the Constitution, the contrary is still vigorously asserted by many people, and the exercise of the power denounced as judicial usurpation. To determine whether or not a statute is unconstitutional is not *per se* the exercise of judicial power any more than it is *per se* the exercise of legislative power or executive power. The Constitution by its terms is declared to be the "supreme law of the land," binding upon the several departments of the Government and upon the people. When a legislative enactment irreconcilably conflicts with the Constitution both can not stand, and the statute as the inferior must yield to the Constitution as the superior authority. Primarily, and it may be ultimately, as in the case of purely administrative laws which do not admit of justiciable controversies, the legislative body in passing the law determines the question that no such conflict exists. In any event there the matter will rest unless and until a case arises under the statute and is regularly presented to the court. When such a case is presented the court must of necessity decide, as between the statute which says one thing and the Constitution which says another and wholly different thing, which of the two controls, and of course must declare, unless the imperious language of that instrument is to be disregarded, that the Constitution, as the "supreme law of the land," necessarily prevails. The court declares the statute void, not because it has the substantive and independent power to pass upon the constitutionality of an act of Congress, for it has no such power, but because, as a necessary incident to the exercise of its undoubted power to decide a controversy properly before it, it must ascertain and determine the law, and by the express provision of the Constitution, which the court is sworn to uphold and bound to enforce, the Constitution is the "supreme law of the land," which the statute is not unless "made in pursuance thereof."

Strictly speaking, a statute whose terms are contrary to the Constitution is not an unconstitutional *law*, for it is no law, or as said by Mr. Justice Field, in the case of *Norton v. Shelby County* (118 U. S., 425) :

An unconstitutional act is not law, it confers no right, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

When invoked in a case, courts simply disregard it as so much waste paper and enforce the Constitution as the binding and controlling rule of action. As forcefully expressed by a learned judge:

In exercising this high authority the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein disclosed, is paramount to that of their representatives expressed in any law.

The Constitution says that "no tax or duty shall be laid on articles exported from any State." If a statute be passed by Congress which, in a case regularly before the court, is challenged as having the effect of imposing an export tax, must not the court determine whether as a fact the statute has this effect, and, if it find in the affirmative, must it not so declare in order that the "supreme law of the land" may be maintained?

Again, "no person \* \* \* shall be compelled in any criminal case to be a witness against himself." If a statute be passed con-

travening this provision and the prosecuting officer call the defendant to the stand, shall the court be powerless to say that the statute is void, and thereby deprive the accused of his constitutional rights by compelling him to testify?

These are extreme illustrations, it is true, but if the courts may declare a statute void when opposed to these plain provisions, it is wholly illogical to deny its power to do likewise in any case where a constitutional provision is contravened, for the language of the Constitution is that "the judicial power shall extend to *all* cases in law or equity *arising under this Constitution.*"

But it is urged that the Constitution was made for a past generation, whose problems were wholly different from those which we are called upon to solve; that its provisions constantly stand in the way of a solution of these present-day problems in accordance with enlightened modern sentiment; that the will of the people is progressive but judicial interpretation is reactionary. Utopian plans of reform are conceived which, because they can not be put into instant operation, engender a spirit of almost intolerant impatience at the delay which must ensue from an attempt to clear the way by the constitutional method of amendment, and the search for a short cut to the desired end is strenuous and persistent.

It is proposed to make judges more responsive to popular opinion by hanging above their heads the threat of the recall. Mr. Roosevelt has suggested as another expedient the recall not of judges but of judicial decisions, which in effect would be to render a judicial decision by what practically amounts to a show of hands at the polls. The mischievous unwisdom of such a suggestion is so plainly apparent that its distinguished author does not seem to have pressed it with his customary vigor. I am not sure whether it is intended to confine this unique plebiscite to the construction of State constitutions, where it would be sufficiently injurious and subversive of justice and orderly judicial administration to justify its condemnation, but, however this may be, other contrivances are from time to time advocated whereby the popular opinion as to the meaning of the Constitution may be enforced upon the courts, both State and Federal. Quite recently a Senator from one of the Western States somewhat petulantly demanded to know why judges should not be responsive to the wishes of their constituents. The demand that the courts shall abdicate the power and duty and responsibility of determining and declaring what is the existing rule of law in the course of a judicial proceeding and automatically accept the impressions of the multitude, proceeds upon a complete misconception of the nature of the judicial office. Perhaps a sufficient reason why a judge should not follow the wishes of his constituents is that he has no constituents. A constituent necessarily implies an agent who acts for him, but the judge is not the recording agent of a constituency; he is an authoritative umpire between two contending parties. He administers, not the edicts of the people, but their laws and statutes. It is incumbent upon him to declare and enforce the rights of the few against the many precisely as he enforces the rights of the many against the few. He is not concerned with anybody's wishes. He must regard the rights of one man as more sacred than the desires of all the world beside. The law and the evidence constitute the only compelling voice to which he must listen. The

poised and balanced scales of justice and not the ballot box is the insignia of his office.

A special and peculiar reason, however, suggests itself why the Supreme Court of the United States should be regarded as the final arbiter as to the scope and meaning of the Federal Constitution. That instrument is not only in one aspect a law, and the supreme law, but is in every essential element, in another aspect, a contract between the parties who made it. These parties were the people of the several States and the political equality of the States of the Union, however differing in wealth and population, is of the essence of the contract. Indeed the only provision of the Constitution which is practically unamendable is that which recognizes this essential and enduring equality by providing that "no State, without its consent, shall be deprived of its equal suffrage in the Senate." This provision, in the opinion of Mr. Tucker, "proves the continual and perpetual independence of the State as a primordial political particle, in order to its own protection against the *vox majoritatis*, whether of population or of States." (I Tucker on the Constitution, 323.) It would seem to follow from this consideration that the people of each State, as against all the others, are entitled to have the provisions of the Constitution accurately interpreted and strictly enforced according to their fair and reasonable intent, and their *right* to insist upon such interpretation and enforcement should and must outweigh the overwhelming and combined *desire* of the people of all the other States for a different interpretation or enforcement. I do not see how in this view it can be said to substantially differ from a private contract entered into by 48 persons of equal rank and right. In such case the united opinion of 47 of the parties would not conclude the one who dissented; he would have a right upon that question to the judgment of the court. In other words, while the Constitution may be *amended*—save in the one particular noted—against the wish or protest of a minority by the concurrence of three-fourths of all the States, it may not be *construed* by a majority of the people, however preponderating, so as to bind the minority, however small, but such binding construction, when the question arises in a justiciable controversy, can be made only by the court which in the contemplation of the Constitution is the duly established official arbiter for that purpose. It would be of little avail to give each State equal suffrage in the Senate for its protection against the voice of the majority as expressed by Congress if its rights might be sacrificed to the preponderating but mistaken opinions of the majority as expressed by the country.

Hence those who suggest that the court must construe the Constitution in accordance with the popular will, or that judicial interpretation should be subject to be overruled by popular opinion, however expressed or ascertained, are simply advocating a method by which the rights of some of the parties to a compact shall be subordinated to the will of the other parties who happen for the time being to preponderate in numbers. Such a condition would not only set the administration of the law afloat upon a sea of uncertainty, but would be contrary to the underlying principles of the constitutional compact, and in the end would subvert the liberties of the individuals, who in alternation may constitute the majority to-day and the minority to-morrow, a result which the whole genius and spirit of the constitutional compact were plainly intended to prevent.



The possibility of the abuse of sovereign power is an ever-present danger under any form of government. If the sovereign power be vested in the king everyone will agree that the necessity of guarding against this abuse is vital and imperative. Upon a superficial view we are apt to overlook this necessity where the sovereign power, as with us, is the people themselves. The people as a whole desire to do no wrong, and their properly expressed will must for practical purposes be accepted as conclusively right; but that the will of the people as expressed from time to time through the decrees of the changing majority may be often unwise and sometimes unjust no thoughtful student of history can doubt; and that this tendency of humanity, individually and in the mass, to err may be minimized without at the same time preventing the effective operation of the deliberately conceived and declared will of the people certain fundamental principles have been formally enumerated, which it is agreed in advance shall be beyond their own power to alter except in the way specifically nominated in the compact. There is no other way by which in a democracy the weak can be safeguarded from the occasional injustices of the strong or the few effectually protected against the aggressions of the many. If these cardinal principles were not first of all fixed and determined and were not thereafter faithfully adhered to; if in the last analysis the most despised and unpopular individual might not have his case determined by the independent judgment of the court, uninfluenced by any consideration other than the learning and the conscience of the judge, standing with naked soul before God, this Government, whatever it might be called, would be not an immutable government of law, but a fickle and inconstant government of men.

While for the protection and enforcement of individual rights involved in particular controversies the judicial interpretations of the Constitution must be accepted as conclusive, it does not follow that they are to be acquiesced in as unchangeable rules for the future. So long as human judgment is fallible, judges will be fallible. As we have been many times told, the law is not an exact science and language is not a perfect medium for the transmission of thought. Judges have erred in the past and will err in the future. The remedy, however, is not to coerce by popular pressure a different ruling against the honest judgment of the court or to overturn decisions by a vote of the majority. That would be to put the opinion of the most ignorant voter in a purely intellectual problem on a par with the wisest and best informed, since at the ballot box men are not measured but counted. If the judges in office can not be persuaded of their error by the general voice of reason, new judges will eventually take their places, and in the long run the popular view, if founded upon sound premises, will prevail. If not so founded it should not prevail. This slow and deliberate process, moreover, is in itself of incalculable value, since its tendency is to school the people to rely upon their sober and deliberate convictions rather than upon their impulses, which, however honest, are more likely to reflect their desires than their judgment. While such a process may in rare and exceptional instances temporarily retard some wholesome reform, it can not permanently stay its progress, and, on the other hand, and vastly more important, it will preclude sudden and ill-considered determinations based upon transitory passion or emotion which, in

the illuminating light of reflection and experience, must thereafter be abandoned as ill advised or misconceived. Viewed in this way it will operate as a balance wheel to steady the public thought against inconsiderate and precipitate action. There can be no greater delusion than to suppose that by putting a ballot into the hands of a voter you thereby put wisdom into his head, unless it be to imagine that an aggregation of individuals can reach accurate conclusions by intellectual processes essentially differing from those which must be employed by the single individual.

Thoughtful observers of present-day conditions can not fail to be impressed with the widespread feeling of political unrest which exists not only among our own people but throughout the world. During the last 50 years we have gone ahead so fast, novel and intricate problems affecting our business, social, and political activities have crowded upon us so rapidly, that their wise solution has sometimes lagged behind the evils which are inseparably connected with them. The cry has gone up that the representative agencies of the people have proven dishonest or ineffective, and there is a passionate demand that the people shall take over the direct management of their governmental affairs by means of the initiative, the referendum, and the recall. It is no part of my purpose to discuss these questions further than to point out that their desirability is to be tested by their practical efficiency rather than by their theoretical righteousness.

I suggest no doubt respecting either the right or the capacity of the people to govern themselves. In the United States they have always done that and they do so now. The question, however, is not whether the people shall govern, but it is by what method can they govern best—by their own direct action or through the governmental agencies which they have created. The tripartite division of governmental powers laid down in the Constitution is, I believe, essential to the preservation of the people's liberties. All history has demonstrated that where the power to make laws, to execute laws, and interpret laws is vested in the same individual or body, despotism inevitably results. The essence of law is that it shall operate generally. Special legislation is almost universally condemned, but where the power to make the law and the power to interpret the law is vested in the same hands, the inevitable tendency is to construe general rules so as to meet special exigencies, and the result in effect is that special and arbitrary enactments are made under the guise of interpretation.

The purpose of constitutions and laws being to standardize human conduct so as to produce uniformity of action, the Constitution must be interpreted to mean the same thing under the same circumstances, wholly irrespective of the persons who may be from time to time affected by such interpretation, and this can be properly accomplished only through instrumentalities which render judgment impersonally in accordance with general principles, and not with a view to the effect of such interpretation in special instances. Constitutional principles would be of little value unless they were permanent and predetermined. You can not make impartial rules while the controversy is pending any more than you can prescribe rules for a game while it is in progress. If, however, the people who make the Constitution also construe it, the tendency will be not to enforce by uniform interpretation the rule already laid down, but to vary

the interpretation so as to meet exceptional cases and avoid special hardships, and the final result will be to entirely submerge the judicial function in the lawmaking function, and the rights of the citizen will be held, not under the definite and unchanging law of the land, but at the mercy of the transitory opinions of the changing majority.

Every provision of the Constitution has a history and some a very long history, and no man can thoroughly understand or correctly apply the various provisions unless he knows the history. If the voters of the country are to assume the responsibility of construing the Constitution in its application to controversies, how many of them will take the time, or will have the time, to qualify themselves to act intelligently by a careful study and analysis of this history? The judges who preside over our courts are men who have done this. We should pause long and think well before we conclude that their judgments based upon ripe and exact learning can be safely overruled at the ballot box.

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. (207 U. S., 148.)

Courts of justice, it has been said, were constituted for the purpose of putting an end to private war, and if we, in our impatience, emasculate their authority or destroy the confidence in which their decisions are held, society will again become a prey to the disturbing and demoralizing effect of physical contention in the settlement of private disputes, and the right of the weak will inevitably go down before the might of the strong. Mr. Justice Miller, in the course of an address on the Constitution, said:

Let me urge upon my fellow countrymen, and especially upon the rising generation of them, to examine with careful scrutiny all new theories of government and of social life, and if they do not rest upon a foundation of veneration and respect for law as the bond of social existence, let them be distrusted as inimical to human happiness.

Somebody has said that it is the tendency of every opinion to become a law. Lawyers from the beginning have exerted a valuable influence in guiding public opinion along sane lines and in formulating it into coherent statutory expression. There has never been a time in all history when the need of the steadying influence of the legal profession is more imperative than it is to-day. There is a growing demand for progressive legislation which must either be met or its unwisdom demonstrated. However impractical in some of its aspects this demand may be, in others it contemplates results which will make for the social betterment, and in so far as this constitutes the purpose it can not and should not be ignored. It must, however, be accomplished upon the sound and enduring basis of "private rights and distributive justice." The training of the lawyer and the judge is such as to render him naturally conservative. Perhaps they are prone to follow precedent sometimes without sufficient regard to the reason which created it, for precedent after all is not a fixed pathway; it is only the opinion of a former traveler as to where the pathway should be. The due process of law clause of the Constitution does not perpetuate for all time the rules of the common law. Indeed the common law itself recognizes its own flexibility and capacity for growth to meet new conditions by the controlling maxim, the reason for the law ceasing, the law itself ceases—*cessante ratione*

*legis cessat ipsa lex.* It is not enough, therefore, to know the old precedent; we must also know the new conditions in order to determine whether the precedent any longer justly applies. If it does not, we must frankly recognize the fact and take up the duty of reforming the law within the principles of the Constitution, which, because they are broadly fundamental, are practically unchanging.

And this can be done and far better done through the existing representative lawmaking agencies, which are definitely responsible to the people, than by the uncertain and superficial methods that will obtain under any form of direct legislation, where the responsibility is so widely diffused that it can not be placed definitely anywhere. "Progress" is a very illusive and a very much abused term. There is need of new definitions. To label a thing "progressive" is of itself suggestive of doubt, for progress should be self-evident. Progress consists in getting a better product, not in smashing the producing appliances and setting up inefficient substitutes. To destroy the governmental methods of modern civilization in order to revive the primitive methods of the tribe is not advancement, but reaction. It is as though we should drive all the architects and builders into exile and construct wigwams for ourselves. I have never been able to convince myself that the possession of strength sufficient to lift a ballot is evidence of ability to make laws, or that because an individual possesses the skill requisite to enable him to insert a piece of paper into the aperture at the top of a ballot box it follows that he is wise enough to interpret constitutions in their application to the diverse and intricate cases which from time to time arise among our people. Society advances not by trying to do everything for itself, but by utilizing the services of those best qualified to serve it and by retaining those who serve it well and putting better men in the place of those who serve it ill. The modern functions of lawmaking and law construing demand not only special training, but constant and deliberate concentration of effort, which the people, acting as a whole, have neither the time nor the persistent inclination to exert. One bullet skillfully aimed will more surely reach the bull's-eye than 50 fired at random. Instead of attempting the impossible task of direct government, the people should employ their energies in the far simpler work of selecting capable representatives.

Before the Government of the United States was established the struggle of man had been for his personal rights and liberties. To possess what he had in peace, to seek happiness, to enjoy life in his own way, to speak with a free tongue, to worship God in accordance with the dictates of his own conscience—these were the things he sought. But now the liberties of the individual have become firmly established; they are no longer in peril. The new struggle and the new aim is for his betterment. The problems which we must solve are not so much individualistic as they are communistic in character. The great and growing cause which must engage the thoughtful attention of statesmen is that of the social welfare. The demand of the people is for laws which will relieve men, women, and children from unduly long and hurtful hours of labor, surround them with better sanitary conditions in their work, protect them from the dangers of rapidly moving machinery, insure them living wages for their work, compensate them or their families for injuries sustained or death resulting from their employment, prevent the monopoliza-



tion of trade and opportunity, and generally promote social justice. The legislatures and Congress are responding to the demand, but the legislation is often enacted in haste and without a thorough understanding of the constitutional limitations upon the legislative power, and these laws after running the gauntlet of impersonal judicial scrutiny are sometimes set aside as unconstitutional.

Immediately one of two things happens. Either the Constitution is condemned as outworn and undemocratic, or the court is denounced as narrow and reactionary, when in fact the lawmaking body or those upon whose demand the lawmaking body acted are to blame. Take, for example, the first Federal employers' liability law, the principle of which was entirely just and wholesome, but which was drawn in such comprehensive language that the Supreme Court was obliged to hold that Congress had undertaken to regulate not only interstate commerce, which was within its power, but to regulate intrastate commerce as well, a subject entirely beyond its competency. This defect being pointed out by the opinion of the Supreme Court, the law was redrawn in terms to apply only to interstate commerce, and as thus redrawn and enacted it was upheld by the unanimous opinion of the Supreme Court.

The New York Court of Appeals has been bitterly criticized for its decision in the Ives case, holding the so-called workmen's compensation law of that State to be unconstitutional as violative of the due process clause of both the State and Federal constitutions. Much that was said by that distinguished court as constituting reasons for the decision, in my judgment, was unsound, but the decision itself when properly understood is clearly defensible. The statute, so far as it need here be considered, attempted to make the employer liable to pay compensation in certain fixed amounts to the employee, or his surviving dependents, in case of his injury or death in the course of his employment, by accident resulting from inherent or trade risks, without reference to negligence, and in addition to this continued, at the election of the employee, the employers' common-law liability for negligence. The effect of the statute was to make the employer when negligent liable to an action at law for such unlimited damages as a jury might assess, and then to superadd a liability for fixed compensation in cases where he was in no way at fault. Under such a law it would seem reasonably clear that there was a naked taking of the property of the employer for the benefit of the injured employee where there had been no dereliction of duty on the part of the employer, the entire burden being arbitrarily imposed upon the employer without any correlative compensating benefit.

But it does not follow that a valid workmen's compensation law, fair to both employer and employee, may not be drafted. The Senate of the United States has recently passed a bill applying to employers and employees engaged in interstate commerce, which, if finally enacted, I feel quite sure will be upheld as constitutional. By the proposed law the interstate carrier is obliged to pay to an injured employee, or in case of his death to his dependents, irrespective of negligence, certain definite sums particularly specified and graduated according to the extent of the injury or the character of the dependents, but the remedy afforded by such compensation is made exclusive and the common-law liability for fault is abolished. Under such a law, while the employer is compelled to pay a reason-

able and definite sum of money in every case of injury or death by accident arising out of the employment, he is relieved from the liability to respond in unlimited and indefinite damages in those cases where his fault could be established, and, on the other hand, while the employees are compelled to surrender their right in future cases to recover unlimited damages in some cases, the law counterbalances this by conferring upon them the right to recover certain and definite compensation in all cases. The New York statute might well be condemned as an arbitrary attempt to deprive the employer of his property. The proposed Federal law is drawn in such a way as to compensate both employer and employee for the rights each is obliged to surrender, and falls within the principle announced by the court in the Noble Bank case (219 U. S., 111), in which it was said:

It would seem that there may be other cases besides the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume.

As pointed out in the report of the Federal commission on this subject:

The exclusive compensation law equalizes the burden. While the employer is made liable in *all cases* of accident for a *definite* amount, he is relieved from the *indefinite* liability which now exists in *some cases*; and while the employee surrenders a present *doubtful* and expensive right of recovery of *unlimited* damages in *some cases*, he receives in exchange a *definite* and *certain* remedy in *all cases*.

Here, then, is a great social and industrial problem which, if approached in a spirit of patience, can be solved by a radical change in the common law with justice to both parties within the terms of the Constitution. Illustrations might be multiplied if the proper limits of such an address as this would permit, but I must content myself with the general statement, confidently made, that a thorough study of the decisions of the Supreme Court of the United States will demonstrate that in the century and a quarter of its existence the decisions holding carefully drawn congressional statutes to be invalid, which decisions, after thoughtful consideration, have been condemned by the people, have been so rare as to be practically negligible.

The assertion, which is so often and so loosely made, that the courts in their decisions respecting the Constitution exalt the rights of property above the rights of man makes a strong appeal to the emotions, but it is untrue in fact and misleading in what it implies. There is nothing more obstructive to the process of reaching just conclusions than catch phrases of this character in which plausible sophistry is made to do the duty of passionless logic. There is no such thing as rights of property apart from the rights of man. The vice and the fallacy of the phrase consist in the suggestion which it makes to the average mind that property as a distinct entity may have rights antagonistic to the rights of man. The language of the fifth amendment is, "No *person* shall be *deprived* of life, liberty, or *property* without due process of law." The thing protected by the Constitution is not the right of property but the right of a person to property, and this right to property is of the same character as the right to life and liberty. When the courts decide that a law infringes the due-process-of-law provision by assuming to take the property of one person and deliver it over to another, the *thing* is not exalted above the *man*, but the right of one man to possess

the thing he owns is held superior to the claim of another to possess it under an arbitrary and confiscatory act of legislation. Courts may sometimes misapply the provisions of the Constitution; they may not in every instance give due weight to our changed and changing social, industrial, and economic conditions, which, while they do not alter the meaning of the Constitution, constantly broaden its scope and application; but, on the whole and in the long run, statutes which intelligently express the persistently dominant and substantially preponderating opinion are upheld.

This important power of the courts to declare statutes void should be exercised, as it has been almost universally exercised, only where the infringement of the Constitution is so plain as to admit of no reasonable doubt in the mind of the judge, but if constitutional and orderly government is to endure there is but one course for the courts to follow, and that is to set their faces steadily and unswervingly against any palpable violation of that great instrument, no matter how overwhelming in the particular instance may be the popular sentiment or how strong the necessity may seem, for if the door be opened to such violation or evasion on the ground of necessity we shall be unable to close it against expediency or mere convenience. Two parallel lines will continue to infinity without conflict and without extending the intervening space, but let them diverge and the divergence, however slight in the beginning, will become immeasurable in the end. So a departure of the line of legislation from the line of the Constitution, though inconsiderable at its inception, will become more and more extended as it proceeds, until some day we shall awake to the startled realization that the two have drawn so far apart that they can never again be reunited.

In the minds of some people the provisions of the Constitution are of the same casual nature and are as lightly regarded as the resolutions they make with the New Year season of repentance, but to the thoughtful student of law and government the great principles of the Constitution, as old as the struggle for human liberty, are as nearly eternal as anything in this mutable world can be. We do not outgrow them any more than we outgrow the Ten Commandments or the enduring morality of the Sermon on the Mount. This assembly of eminent lawyers does not need to be reminded of the conditions which made the adoption of the Constitution an overshadowing necessity in order that all the sacrifices and all the sufferings of the Revolution might not be in vain. The Constitution did not create the Union, but, by making it "more perfect," preserved it from destruction. If the present-day teachers of vague and visionary reform would know the fate which will overtake the Republic if the Constitution, through the shattered faith of the people, shall lose its binding force, they have but to read the history of our country under the Articles of Confederation. If by some unhappy turn of fortune the Constitution should be wrecked, those conditions will be repeated, but intensified in the proportion that our population has increased, our territory extended, and our problems have become more numerous and intricate. The 48 States into which our imperial domain has finally been rounded, filled with patriotic, intelligent, justice-loving people, after all constitute but the body of the Union. Its soul is the Constitution.

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THE  
INDEPENDENCE OF THE JUDICI-  
ARY, THE SAFEGUARD OF  
FREE INSTITUTIONS

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ADDRESS BY  
WILLIAM B. HORNBLOWER

TO THE GRADUATING CLASS OF THE  
YALE LAW SCHOOL, JUNE 17, 1912



PRESENTED BY MR. McCUMBER  
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# THE INDEPENDENCE OF THE JUDICIARY THE SAFEGUARD OF FREE INSTITUTIONS.

[Address to the graduating class of the Yale Law School June 17, 1912, by William B. Hornblower, of  
New York.]

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In choosing a subject for this address, I have been tempted to take some academic topic such as the relative merits and demerits of the common-law system of jurisprudence "broadening out from precedent to precedent" as compared with statutory law rigidly embodied in codes, or the relative merits and demerits of combination as compared with competition in trade and commerce and the merits and demerits of statutory regulations on such subjects.

There are, however, certain burning questions of the day affecting the independence and integrity of our judicial system on which I feel it to be the duty of every lawyer to speak out with all the force and emphasis at his command and which I do not feel at liberty to ignore.

To evade or to ignore these questions would be to be recreant to my professional duty. When the integrity and independence of the judiciary are at stake, all other questions become unimportant.

When the sappers and miners are at work undermining the foundations of our judicial structure, it is idle to discuss questions of detail of construction or reconstruction of the edifice.

The young men just graduating from our law schools find themselves confronted by a most serious situation. They find the courts subjected to attack and exposed to peril. The rising generation of lawyers are called upon to resist this attack and to defend the court from this peril. As officers of the courts sworn to support the Constitution of the United States and of the State, and to faithfully discharge their duties as attorneys and counselors at law, it becomes their duty to see that no harm comes to the administration of the law, or to the usefulness or the prestige of the courts, and that no harm comes to the Commonwealth through this attack on the courts and the law.

The air is rent by the clamor of those who are crying out for what is known as judicial recall.

This is no longer an academic question. Three at least of our States have already embodied it in their constitutions. Agitation in favor of extending this so-called reform to other States has been and is being actively carried on. Advocates of the recall are found even in the ranks of our own profession.

The self-styled progressive is not necessarily the true progressive. He may be a reactionary of the worst kind. To set back the clock of time is not progress but regress. Civilization rests upon law. Law rests upon the courts. The courts rest upon popular respect. If for law and for the courts are to be substituted the voice of a temporary majority of the people, then are we pro tanto abandoning the achievements of civilization and drifting back to barbarism.



Civilization consists in subordinating the wishes of the majority to the rights of the minority. Slowly and carefully and painfully have the ideals of civilization been built up. Every now and then we are called upon to contend with an outburst of primeval passion in the shape of lynch law. The spirit of lynch law may be manifested in attacks on the individual citizen or in attacks on the courts themselves. In this country our fathers devised safeguards of the rights of a minority against the temporary whims of the majority by imposing constitutional limitations upon legislative authority. The judiciary has by its duty to administer and define these constitutional limitations and to refuse to enforce unconstitutional legislation become the defender of those fundamental rights of the minority.

It has always been the boast of our Anglo-Saxon Republic that we are a common-sense people; that extreme theories have no charm for us; that we do not fall in love with mere phrases or catchwords. The conservatism of our people has been proverbial. The bar of this country has been the guiding force which has kept the popular ideals from running after strange gods.

The question now confronts us, are the old ideals to be abandoned? Are we to continue to be a government of law administered by the courts, or are we to become a government of agitators by whom law and the courts are only to be tolerated so long as the law and the courts are in accord with the popular wishes of the moment? These are grave questions going to the very root of our system of government.

Of course, the proposition for recall of judges is not imminently threatening in those States where the judges are not as yet elected by popular vote. In Connecticut, in Massachusetts, and in New Jersey, for instance, where the judges are appointed by the governor or the legislature, there is no force in the a priori argument that a judge elected by the people should be immediately and directly responsible to and removable by the people. The spirit of antagonism to judicial independence, however, unless checked, will inevitably spread to the States where the judiciary is nonelective. Members of the bar in all the States are thus vitally interested in resisting the propaganda for recall of judges.

As to the question of the recall of judges during their term of office, the question is to be considered under various aspects. First, as to its effect upon the personnel and character of the judges themselves. Secondly, as to its effect upon the rights of individual litigants. Thirdly, as to its effect upon the principles of the law. Fourthly, as to its effect upon the rights of the public.

The aspects of the question in each of these particulars need to be separately considered. They are, however, in the popular discussion of the subject continually confused.

First, as to the effect upon the personnel and character of the judges themselves.

It is urged that men are frequently chosen for the bench who are incompetent, inefficient, or even corrupt; that the remedy by impeachment for the removal of a judge found to be incompetent, inefficient, or corrupt, is grossly inadequate; that where a judge is found to be incompetent, inefficient, or corrupt the people whose servant he is should have the right to summarily remove him without the formality of a trial and to substitute in his place a better man.

This sounds plausible, but to anyone who is familiar with the working of our judicial system, the fallacy of this argument will be apparent if he stops to give it full consideration.

So far as concerns the question of incompetency or inefficiency this is a matter for difference of opinion. What constitutes incompetency or inefficiency? Every defeated litigant considers the judge who decides against him to be incompetent and inefficient, and in this opinion he is frequently encouraged by his counsel who is temporarily smarting under what he considers an undeserved defeat. The question of the competency or efficiency of a judge is one to be determined by a careful consideration of his judicial decisions as a whole. To have the question of the competency or efficiency of a judge passed upon by popular vote is as irrational as it would be to have the competency or efficiency of a physician passed upon by popular vote. How are the people to determine whether the judge whose recall is proposed is really inefficient or incompetent? It is easy to allege inefficiency or incompetency, but opinions will differ as to whether a particular judge is or is not inefficient or incompetent.

When we come to the question of corruption, the injustice of having such charges passed upon by popular vote after a heated campaign with violent harangues by popular orators without any legal proof of the charges is manifest. To have the honesty or dishonesty of a judge determined by the effect of stump speeches upon the platform, by loose declamations and unsworn statements of interested parties without any opportunity for careful examination, is to subject a judge to an indignity and a possible injustice which may blast his reputation for a lifetime. How often have we heard disgruntled clients, or even indignant lawyers, complain that a judge has been bought or improperly influenced to render adverse decisions when we are confident that such charges are absolutely unfounded, and are the product of an over-heated imagination resulting from the bitterness of defeat in a hard-fought litigation!

The recall will furnish a ready weapon for party warfare upon the judges. Republican judges may be voted out and Democratic judges voted in and vice versa, whenever the shifting popular majority shall change from one party to the other.

Certainly as a method of improving the personnel of the judges, the method of subjecting them to the indignity of a recall whenever any defeated litigant can persuade a majority of the voters that a judge is incompetent or inefficient or corrupt is the worst possible method. To force a judge against whom such charges are made to take the stump and defend himself in public while still on the bench would make his position as a judge intolerable to himself and worse than useless to the public.

It is difficult enough already, especially in our larger cities, to induce the ablest and most successful members of the bar to forego the honors and pecuniary rewards of the bar for the labors and the smaller compensation of the bench. If the position of the judge is to become subject to the indignity of a possible recall, it is hard to see what inducement there would be to a successful practitioner to incur the risk of such indignity.

Moreover, the futility of the scheme for judicial recall as a remedy for existing evils, real or imaginary, is apparent. The advocates of recall overlook the fact that the successors of these incompetent,



inefficient, or corrupt judges are to be selected by the voters of the very same constituency which is responsible for the election of the incompetent or inefficient or corrupt men who are to be recalled, and the identical political bosses, or conventions, or primaries, which selected the recalled judges are to select their successors. We are thus traveling in a vicious circle. Elect incompetent, inefficient, or corrupt men, recall them and elect others in their place to be again recalled and others again to be elected in their place by the same constituency and the same methods.

Secondly, as to the effect of recall upon the rights of individual litigants.

It needs no prophet to foresee what the effect might be upon the mind of the judge where on the one side was a litigant with powerful political influence, and on the other side an individual contending for his rights against such influence. So, where an individual is contending for his rights or his alleged rights against the interests or supposed interests of the community in which he lives, or against a strong popular prejudice, how can any but an exceptionally strong-minded judge be expected to hold the scales of justice even? Our ideal of a judge as we have heretofore understood it is that of a judge absolutely fearless, knowing no friend or foe, knowing neither majority nor minority, knowing neither rich nor poor, fearing no man and no body of men. We have heretofore endeavored to cultivate this ideal by giving a judge a fixed term of office during which he can be removed only for cause and after an opportunity to be heard in his own defense by a competent tribunal. If we substitute for this ideal a judge who may at any moment be recalled by reason of an unpopular decision, the tendency is to have a judge constantly listening for a wave of public opinion with his ear "to the ground" or eager to curry favor with the bosses who control the nominations and who can incite the voters to the exercise of their power of recall. I do not mean of course to say that every judge would be of this character or that the standard of judicial independence and integrity would be immediately disturbed, but I do say that the tendency and the constantly accelerating tendency would be to substitute for the fearless and independent judge a spineless, flabby, cowardly judge, a reed shaken by the wind.

In the interest of the individual litigant, therefore, we should protest against this change in our judicial system.

Thirdly, as to the effect of judicial recall upon the principles of the law.

It is to be borne in mind that our common law system of jurisprudence is founded upon the courts. The courts not only administer the law but declare the law. Indeed it may be said that the law is what the courts declare it to be. And this is true, even where statutes are concerned, since statutes have to be interpreted and enforced by the courts. If the system of judicial recall is to be adopted, it would necessarily be applied not only to the judges of the inferior courts of nisi prius, but to the judges of the appellate courts as well, whose duty it is to declare those general principles which are to govern the nisi prius courts in the practical administration of the law. It is essential to the orderly development of our jurisprudence that the judges of our various courts of last resort should be encouraged by the tenure of their office, and the surroundings of

their position to exercise a calm and broad judgment in the disposition of the important questions coming before them for determination, and that they should be guided by the well-considered precedents of the past as interpreted by what the Supreme Court of the United States has called "the rule of reason." How can it be expected that the orderly administration of the law by our highest courts of our various States and the harmonious development of our jurisprudence can be maintained if a judge of the highest court of the State is obliged to answer at any time to a popular agitation for his recall, based upon some judicial decision in which he has participated? A judge of the highest court of the State whose judicial labors might be interrupted at any moment by such a contingency would cease to be an exponent of the principles of law and would rapidly tend to become a respecter of persons, of parties, of politicians, and of the temporary majority of the voters.

Fourthly, as to the effect of judicial recall upon the rights of the public.

The public is entitled to the free and untrammelled exercise by the judges of the functions for which they are put in office. If instead of devoting their entire time to the performance of their public duties the judges are liable to be called aside from time to time to conduct a political campaign in defense of their own conduct upon the bench, to that extent the public is deprived of the services for which they have placed the judges upon the bench.

The spectacle of our judges, instead of earning their salaries by persistent attention to their judicial duties, spending their time and their salaries in racing up and down their judicial districts haranguing the multitude in defense of their judicial conduct, is such a perversion of all judicial proprieties that only the comic-opera stage and the genius of Gilbert and Sullivan are adequate to do justice to the situation. It must be borne in mind that the better the judge and the longer he serves upon the bench the less facile does he become in the arts of public speaking and the more helpless does he become to meet the specious, adroit, plausible, unscrupulous, and malicious demagogues who may come forward upon the stump to attack him. Indeed, to a sensitive, high-minded, upright judge nothing could be more revolting than to be forced into a campaign in the midst of his term of office to prevent his recall and to be compelled to choose the alternative of letting the campaign go by default while he, quietly and laboriously, goes on with his judicial work or of matching his powers of public address against the noisy and glib vituperation of the stump orator, whose powers of reasoning are usually in inverse ratio to his powers of vigorous denunciation.

The judge's principal function is, after all, to protect the rights of the minority against the majority. The public is vitally interested in preserving intact this function. The majority of to-day may become the minority of to-morrow.

We hear it said constantly nowadays that the reason for this agitation for judicial recall and for the apparent strength of the agitation among the people is the inefficiency of the judicial system as it now exists; in other words, that there are so many inefficient and incompetent judges upon the bench that the public mind has become impatient and demands some effective method of repudiating them. I have already pointed out, however, that where our judges are

elected by the people the remedy by recall will be absurdly ineffective. We are quite as likely to have successors who will be equally inefficient or incompetent as the judges who are recalled.

But it is said that our entire administration of justice in this country is full of technicalities and delays and that this constitutes an excuse, if not a justification, for the present distrust of the judiciary and the present agitation for some such rough and ready remedy as judicial recall. It must of course be admitted that many of the criticisms of our judicial system and of the administration of justice are well taken. I do not admit, however, that there is any special force in these objections when directed against the courts of the present day as compared with the courts of any previous date. Indeed, I am inclined to think that the courts of to-day are less technical and less disposed to sacrifice substance to form and to sacrifice justice to methods of practice than at any previous period in the history of our country.

Comparisons between the methods of administering justice in this country and those which are prevalent in England are misleading. Extreme instances are cited from one or another of our 48 States, and these extreme instances are compared with the average course of justice in Great Britain. If, however, we take the States by themselves and compare one with another and compare the generality of the States with the courts of Great Britain we should find a very different story.

The bench and bar of to-day are, I venture to say, keenly alive to the importance and necessity of revising and simplifying our methods of procedure. In my own State the legislature has at its last session directed the board of statutory consolidation, of which I am one of the members, to report a plan to the legislature at its next session for the simplification of our procedure, which has become by successive attempts at reform and successive codes of procedure and codes of civil procedure a complicated and voluminous practice act of Brobdignagian proportions. But I am unable to see and can not concede that the discontent with the present methods of practice is the real ground for the popular agitation against the courts and the judges. The people, as a whole, are but little affected by the delays or difficulties caused by technical procedure. Indeed, they know little or nothing of these things by experience. Their real grievances are caused by particular acts of particular judges in particular cases which are made the basis of inflammatory attacks by agitators and which are supposed to be against the interests of the people or of some class of the people. So far as concerns the grievances growing out of technicalities or the cumbersome administration of the law, judicial recall would be worse than futile, since the individual judge is not responsible for the cumbersome provisions of practice acts, but the legislatures who have adopted them. It is not the individual judge who is to be attacked, but the whole body of judges and the legislature which enacts the law under which the judges are required to administer their offices.

Let us not deceive ourselves or live in a "fool's paradise."

The real ground of popular unrest and discontent with the courts is the feeling that courts are too much inclined to favor vested rights of property rather than personal liberty. There is a restiveness at

constitutional restraints which finds vent in the demand for judicial recall and recall of judicial decisions.

Yet it is precisely by the enforcement of those constitutional restraints that personal liberty is to be preserved.

"Due process of law" is the protection not only of "property" but of "life and liberty as well." "Life, liberty, and property" are not to be taken away, says the constitutional prohibition, "without due process of law."

Weaken the power of the courts to protect "property" and you necessarily weaken the power to protect life and "liberty" against unconstitutional encroachments.

It behooves every lawyer who loves his country to bestir himself and to appeal to that American respect for law and regard for the Constitution and that wholesome American contempt for the visionary theorist and the wily agitator which have hitherto preserved our liberties from destruction.

I have hitherto spoken of judicial recall. What about the so-called "recall" of judicial decisions? This is a scheme lately devised by an ex-President of the United States. By the later interpretation placed upon it by its author it is narrowed down to a very limited class of cases. It is not every decision which is to be recalled by popular vote, but only special classes of decisions. Indeed, the decision itself is not to be revoked so far as concerns the individual litigants with regard to whom the decision was had, but the principle announced by the decision. The scheme as at present formulated by its author, as I understand it, is this: Whenever the highest court of a State shall have declared unconstitutional a particular statute of the State passed under the "police power" of the State for the supposed benefit of the health or welfare or safety of a portion of the community, and whenever such statute has been held by the highest court of the State to be unconstitutional because interfering with the life, liberty, and property clause of the constitution of the State, the people of the State shall have the right by a majority vote to set aside the decision of the court declaring the statute to be void and to restore the authority of the statute by plebiscite.

As thus restricted, the principle leaves unimpaired the power of the highest court of the land, a court, by the way, composed entirely of judges not elected by the people at all, but appointed by the Executive with the consent of the Senate, and not removable by the people, but only removable by impeachment, and holding office for life or good behavior, to do the very things which the State courts are to be prohibited from doing, viz, to set aside absolutely and without any right of review a statute of a State passed under the police power of the State for the protection of the life, health, or safety of a portion of the community.

If it be said that a statute approved by the State court is hardly likely to be set aside by the United States Supreme Court, we can point to numerous cases where this has been done.

Thus, in the famous bakeshop case of *People v. Lochner* (177 N. Y., 145), the Court of Appeals of New York affirmed the constitutionality of a law limiting the hours of labor of employees in bakeries and held it to be a valid exercise of the police power of the legislature relating to the public health. The decision was reversed by the



Supreme Court of the United States (198 U. S., 45), which court held the act to be unconstitutional as an unreasonable interference with the liberty of the citizens.

The number of cases is legion where State statutes which have been upheld by the State courts have been set aside by the United States Supreme Court as violating the clause of the Federal Constitution forbidding a State to pass any law impairing the obligation of a contract.

How long will it be before some future agitator, clamoring for the right of the people to rule, will insist that the decisions of the United States Supreme Court itself shall be made subject to review by popular vote? The Federal courts have been in the past subjected to the fiercest attacks by political agitators and have been regarded with far more disfavor than the State courts. Only recently the decisions of the United States Supreme Court in applying the "rule of reason" to the Sherman antitrust act and in applying to that act a "reasonable construction" have aroused the anger of a large number of extremists.

The attack on the right of the courts to declare an act of the legislature or of Congress unconstitutional is but a recrudescence of an attack which has been from time to time waged upon the courts ever since the foundation of our Federal Government. It has, indeed, been from time to time openly asserted and claimed that the courts have usurped a power not originally conferred upon them by the Constitution, State or Federal, and not within the original intention or purview of the framers of the constitutions. This proposition has even received support and encouragement from some of our best known writers on academic questions of constitutional law and even from professors in our law schools. It may not be unnecessary, therefore, to remind ourselves of the fallacy of this proposition.

So far as the Federal Constitution is concerned, the debates in the convention and the statements in the Federalist clearly show that the power and duty of the courts to declare an act of Congress or an act of the legislature void as unconstitutional was contemplated.

In the convention which framed the Federal Constitution, it was proposed to create a "council of revision" to be composed of the Executive and a convenient number of the national judiciary, with authority to examine every act before it shall operate with a qualified veto power. This proposition was, however, rejected.

In the course of the debate, the provision for making the judiciary a part of the council of revision was objected to on the ground among others that it would interfere with their freedom from bias when later called upon to expound the law.

On this point, Mr. Elbridge Gerry, of Massachusetts, said he doubted whether the judiciary "ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation." (Madison's Journal of the Federal Convention (Scott's Ed., Chicago, Albert Scott & Co., 1893), p. 101.) Mr. Gerry moved a proposition to give the veto power to the Executive alone. Mr. Rufus King, of Massachusetts, seconded the motion "observing that the judges ought to be able to expound the law, as it

should come before them, free from the bias of having participated in its formation." (Ibid., pp. 101 and 102; Farrand's Records of the Federal Convention, Vol. I, pp. 97, 98.)

Mr. Wilson, of Pennsylvania, assumed that the judges as expositors of the laws would have power to refuse to give effect to laws clearly unconstitutional (Ibid., p. 398).

Mr. Luther Martin, of Maryland, considered that the association of the judges with the Executive would be a dangerous innovation. "As to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the revision and they will have a double negative." (Ibid., p. 402; Farrand's Records of the Federal Convention, Vol. II, p. 76.)

There were, it is true, some members of the convention who protested against conferring upon the judiciary the right to refuse to enforce unconstitutional statutes, but their protests only serve to emphasize the views of those who assumed that the judiciary would of necessity be called upon to pass upon the constitutionality of statutes, State and Federal.

That the power and duty of the courts to pass upon the constitutionality of statutes was contemplated and intended by the framers of the Federal Constitution is made plain by the statements of the Federalist.

In No. LXXVIII of the Federalist it is said:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority, such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. \* \* \*

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. \* \* \*

If, then, the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency in the meantime to occasion dangerous innovations in the Government and serious oppressions of the minor party in the community.

Human language could not be more explicit than this. The Federalist was, as we all know, published as an appeal by Madison, Hamilton, and Jay to the American people for the adoption of the Constitution. That the adoption of the Constitution by the

various States was due to the lucid and forcible exposition of its principles in the *Federalist* has been universally conceded. It follows that when the Constitution was adopted, it was adopted with explicit notification that the courts were intended to have the power to declare statutes unconstitutional.

I am quite at a loss to understand the state of mind of those who talk about "judicial usurpation" in passing upon the constitutionality of statutes. It would clearly have been judicial breach of duty if the courts had failed to exercise the function thus clearly imposed upon them.<sup>1</sup>

Indeed, the duty of a court to refuse to enforce an act which violates a provision of the Constitution is perfectly obvious when we reflect upon the nature and objects of constitutional restrictions upon legislative authority.

As the matter was forcibly stated by Chief Justice Marshall in the great epoch-making case of *Marbury v. Madison* (1 Cranch's Repts., 137-180):

If two laws conflict with each other the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our Government, is entirely void is, yet, in practice, completely obligatory. It would declare that, if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that these limits may be passed at pleasure.

So unanswerable was the logic of the Chief Justice's opinion that, although it was really but an obiter dictum, the decision of the court being that they had no jurisdiction of the particular matter before them, being an application for an original writ of mandamus, not in aid of their appellate jurisdiction, the application for the writ being discharged, yet it became the foundation stone on which was built up the vast structure of constitutional jurisprudence, State and national, in this country. This structure has stood firm, from that day to this, notwithstanding the assaults of would-be innovators and the criticisms of academic theorists.

In George Ticknor Curtis's *Constitutional History of the United States* (Vol. I, p. 593) the subject is very forcibly put as follows:

To withhold from the citizen a right to be heard upon the question which in our jurisprudence is called the constitutionality of a law when that law is supposed to govern his rights or prescribe his duties would be as unjust as it would be to deprive him of the right to be heard upon the construction of the law, or upon any other legal question that arises in the cause. The citizen lives under the protection, and is subject to the requirements, of a written fundamental law. No department of the

<sup>1</sup> The evidence on this subject is very clearly set forth in an able and thorough article by Prof. C. A. Beard in the "Political Science Quarterly" entitled "The Supreme Court—Usurper or Grantee?" which was called to my attention after I had completed the first draft of this address ("Political Science Quarterly," March, 1912, Vol. XXVII., No. 1).

national, or of any State government, can lawfully act otherwise than according to the powers conferred or the restrictions imposed by that instrument. If a citizen believe himself to be aggrieved by some action of either Government which he supposes to be in violation of the Constitution, and his complaint admit of judicial investigation, he must be heard upon that question, and it must be adjudicated, or there can be no administration of the laws worthy of the name of justice.

It is said by Mr. Justice Brewer in *Muller v. Oregon* (208 U. S., 420):

Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.

The most serious aspect of the present agitation is not in its immediate results, but in the tendency toward ever increasing and rapidly accelerating demands for further changes in the direction of impairing the integrity and the independence of the judiciary.

It is said that the recall of judges if put into the constitution of a State will be seldom used, and the experience of Oregon is cited as an example.

The test will come, however, in times of great public excitement, when popular resentment is aroused against the enforcement of the law affecting some class of the community.

Already threats have been made to invoke the recall in California to rebuke the judges for enforcing the law. What would have been the situation during the recent McNamara trial in California if judicial recall had been in force during that trial?

The McNamaras were on trial, it will be remembered, for dynamiting a newspaper office in Los Angeles, causing the death of several workmen. Intense feeling was aroused by the trial. Great numbers of men connected with labor unions insisted and most of them perhaps honestly believed the McNamaras to be innocent of the alleged crime and to be the victims of an unjust and malignant persecution in the interest of the capitalistic classes. The McNamaras ultimately and before the close of the trial confessed their guilt and thus took the question of their guilt or innocence at once and forever out of the region of uncertainty.

No amount of testimony, however direct and positive, and however convincing to a jury, could possibly have made the guilt of the defendants absolutely clear to their sympathizers beyond all controversy, so long as the defendants had continued to protest their innocence. Suppose they had not confessed their guilt, but had been convicted and sentenced, can we doubt that there would have been public resentment and public clamor and that judicial recall would have been promptly invoked to punish the judge who presided at the trial? Confession of guilt and that alone has vindicated the prosecutor and the judge.

"The appetite grows by what it feeds upon." It is appalling to think of the extremes to which popular majorities under the instigation of inflammatory harangues by eloquent or persuasive orators may be driven.

The right of the minority to be protected in their lives, liberty, and property from the clamor of temporary popular majorities is absolutely essential to the preservation of our free institutions.

"Half the wrong conclusions at which mankind arrives are reached by the abuse of metaphors," is a remark attributed to Lord Palmerston.



"The people never give up their liberties but under some delusion," said Burke in his speech at the county meeting of Bucks.

Misleading catchwords and specious phrases are a cause of those delusions under which people are unconsciously led to give up their liberties. The abuse of such catchwords and specious phrases is quite as potent a cause of wrong conclusions as the abuse of metaphors.

"Let the people rule; back to the people" is the slogan. Under the influence of these phrases the attack is made upon our courts, which have heretofore made free government possible and which have been the essential safeguard of constitutional liberty. If the independence of the judiciary can be destroyed and if respect for the courts and the law can be undermined, then can the clamor of the majority be substituted for the rights of the minority and popular government based upon constitutional limitations is at an end.

The misleading effect of catchwords and phrases is well illustrated in the matter of presidential primaries. The avowed object of these primaries was to get rid of the "bosses" and to enable the people to express their choice of candidates directly and without the interference of costly and cumbersome convention machinery. Yet has there ever been a more extraordinary exhibition of the squandering of money since the foundation of the Republic than we have seen in the presidential primaries of this year of grace 1912, in the endeavor to let the people rule? What chance, let us ask, would Lincoln, a poor country lawyer, have stood, if he had been compelled to open headquarters, to publish and distribute tons upon tons of campaign literature, to hire special trains, to pay hotel bills for himself and his cohorts, and to travel thousands of miles at his own expense or the expense of his supporters? The cold fact is, and there is no use in blinking at the fact, that no man can be a candidate for the presidential nomination to-day who is not either a man of independent fortune or a man who has supporters ready and willing to furnish pecuniary assistance. It is no exaggeration to say that money has been poured out like water in this campaign, not to buy votes, but to enlighten the voters as to the merits and demerits of the candidates. And all this before the national conventions have been held and before the expenses of the presidential nominees of the various parties have begun. Who would have financed the campaign expenses of the country lawyer, Lincoln, in a presidential primary, and what show would he have had as against Seward or Chase? I am not blind to the defects and dangers of our system of party conventions as heretofore carried on, but in undertaking the radical changes embodied in presidential primaries are we not jumping from the "frying pan into the fire"?

What I am particularly desirous of pointing out is the danger of catch words and phrases. "Back to the people" as applied to the judiciary by recall of judges and recall of judicial decisions means "back to disorder and injustice" and death to constitutional liberty.

Fortunately, each State must determine for itself whether or not there shall be a recall of judges or a recall of judicial decisions by popular vote.

Wild vagaries of faddists and theorists may be indulged in by one or more of our States without breaking down the safeguards

of our sister States. This is the greatest advantage of our Federal form of government.

I appeal to you, gentlemen, as you go forth to practice law in your various States, that you do what in you lies to prevent the spread of these heresies in your several States.

Remember that the independence of the judiciary is the keystone of our form of government—that if the keystone is removed the whole structure is in danger of disintegration and destruction.

Remember that the safeguards of the Constitution must be preserved intact and the right and duty of the judiciary to protect and enforce the Constitution of State and Nation must be sedulously and carefully maintained, or the day will surely come when might shall take the place of right and when the government of the whole people by the whole people and for the whole people shall be supplanted by government of the whole people by a majority of the voters for a majority of the voters. Then will government of law and order come to an end.

I do not believe that that day will ever come. I am a strong believer in the common sense of the common people. I believe that the rash experiments of those of our States who have adopted this revolutionary constitutional change in their judicial system known as judicial recall will not be followed by their sister States, and that these States themselves will come to see the error of their ways and will change back to the safe paths of their ancestors.

WILLIAM B. HORNBLLOWER.





63D CONGRESS }  
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# Recall of Judicial Decisions

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## AN ARTICLE

FROM LEGAL BIBLIOGRAPHY OF MARCH, 1913  
DEALING WITH THE PROPOSITION FOR THE  
RECALL OF JUDICIAL DECISIONS

BY

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PRESENTED BY MR. NELSON

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## RECALL OF JUDICIAL DECISIONS.

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By EZRA RIPLEY THAYER, *Dean of the Law School of Harvard University.*

[From Legal Bibliography of March, 1913.]

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I have read with interest Mr. Chipman's article<sup>1</sup> in the last number of Legal Bibliography discussing Prof. Thayer's address on "The origin and scope of the American doctrine of constitutional law" and President Roosevelt's indorsement of that address.<sup>2</sup> I am led to add a word because Mr. Roosevelt's approval of Mr. Thayer's views has been repeatedly and cordially expressed in connection with the proposed "recall of judicial decisions," and some persons may therefore have supposed that Mr. Thayer's views tend to sanction that project. I think the error of such an impression can be made plain.

Mr. Thayer's subject was the true nature and limits of the judicial power to pass on the validity of legislation. This power, he said, was "a purely judicial one," and "its whole scope" was "to determine, for the purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the Constitution." Unless the question comes before the court in this way—and often it may not—the legislative action is beyond control. And even when the question is properly before the court, it must so—

discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they

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<sup>1</sup> For reference this article of Mr. Chipman is appended below.

<sup>2</sup> The address here referred to was delivered in 1893 by James Bradley Thayer, Weld professor of law in Harvard University, before the congress on jurisprudence and law reform at the World's Fair in Chicago. Of this address Mr. Roosevelt has written, as follows:

"I criticize the decisions of judges only by adopting as my own the language used about these same decisions by the highest judges in the land, by, for instance, the present Chief Justice of the United States, Mr. Justice White; \* \* \* or by private citizens, like James Bradley Thayer, the greatest professor of law that Harvard University ever had. \* \* \* It was he (Mr. Justice Moody, when Attorney General) who called my attention to the first essay in Prof. Thayer's book of Legal Essays on 'The origin and scope of the American doctrine of constitutional law.' Nowhere else is there a clearer statement, both of the advantage of conferring upon the courts the power that they possess under our system and also of the further fact that unless that power is wisely exercised it must inevitably be restrained. \* \* \* I wish that sincere men would turn to Mr. Ransom's book on this subject, just published by the Scribners. I wish that they would turn to the legal essays of Dean Thayer, the great dean of the Harvard Law School, and read the first essay, that on constitutional law. Let them study what Dean Thayer therein says, and what he quotes from judicial opinions rendered 50 and 100 years ago in this country, as to the extreme unwisdom of the use and abuse of this power by judges with the recklessness characterizing its use and abuse of recent years."

Prof. Thayer was not dean of the Harvard Law School, but that position is now occupied by his son, the writer of this article.

[The above two notes are by the editor. Other notes are by the author.]

require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional lawmakers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since *their* question is a naked judicial one.<sup>1</sup>

And this "naked judicial" question is not whether the court believes the law in question to be constitutional, but whether such an opinion in the legislature was *rationaly permissible*. It is only when the court can answer this question in the negative that it is justified in declaring the statute unconstitutional. Much of Mr. Thayer's address is devoted to showing the reality of this distinction—the distinction observed every day by courts in reviewing verdicts of juries. In the one case, no less than in the other, the court must often recognize that other views than its own may reasonably be held;

that having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man or body of men may reasonably not seem so to another; that the Constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the Constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.<sup>2</sup>

The oft-repeated proposition "that courts will never declare a statute void unless the nullity and invalidity are placed beyond reasonable doubt" is no mere cautionary phrase but marks a difference of capital importance. "The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate."<sup>3</sup> There is a—

vital and absolutely fundamental distinction between the legislative and the judicial question in cases of the class to which these now under consideration belong. Where our system intrusts a general subject to the legislature, nothing but the plainest constitutional provisions of restraint, and the plainest errors, will justify a court in disregarding the action of its coordinate legislative department—no political theories as to the nature of our system of government will suffice, no party predilections, no fears as to the consequences of legislative action. In dealing with such questions the judges are, indeed, not acting as statesmen, but their function necessarily requires that they take account of the purposes of statesmen and their duties; for their own question relates to what may be permissible to a statesman when he is required by the Constitution to act, and, in order that he may act, to interpret the Constitution for himself; it is never, in such cases, merely the dry question of what the judges themselves may think that the Constitution means.<sup>4</sup>

Mr. Thayer was profoundly impressed with the importance of this doctrine and the danger of its disregard by the courts. This danger was inherent in the nature of things; for due deference to the legislature in respect of enactments honestly regarded by the court as both vicious and unconstitutional requires a fine restraint and a large point of view. He saw more clearly than some others whither led the road on which courts had already entered in interpreting "liberty" and "property"; and in the light of recent experience his warnings are impressive.

This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the lawmaker.

<sup>1</sup> Thayer, Legal Essays, 9.

<sup>2</sup> Thayer, Legal Essays, 22.

<sup>3</sup> Thayer, Legal Essays, 29.

<sup>4</sup> Thayer, Legal Essays, 30n.



*Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.*

The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them—the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged in every State with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coordinate department of the Government, charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it can not rightly attempt to protect the people by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, to-day, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it.<sup>1</sup>

Some courts have not regarded these warnings, and in their mouths the rule that legislation should not be set aside unless its unconstitutionality was clear beyond a reasonable doubt has “become a mere courteous and smoothly transmitted platitude.” These courts have done their duty as they saw it; but they have none the less erred in fundamental conceptions of constitutional law, and “in the milder method of usurpation of power by decisions have encroached upon the field of legislation.”<sup>2</sup> Such things as Mr. Roosevelt’s proposal and the state of public feelings from which it sprung are the precise evils against which Mr. Thayer’s warnings were directed. And they have followed as the night the day upon the court’s failure to recognize the scope of legislative power.

Among the evils which such judicial action brings in its train is suspicion of other decisions involving no such error and needless attacks on our constitutional system to secure ends attainable by means now at hand. These are to be expected from ardent reformers distinguished for courage and acuteness rather than sanity or patience, whose lack of training in the law leaves them unaware of the flexibility and scope of our existing constitutional machinery.

The plan for the “recall of judicial decisions” has been much discussed and misunderstood. Its scope has not always been clear and may have been somewhat wider at the outset than afterwards. But in time, with Mr. Roosevelt’s indorsement, it took the shape of a

<sup>1</sup> Thayer, *Legal Essays*, 32–33, 39, 41n.

<sup>2</sup> McCarthy, *The Wisconsin Idea*, 267.

proposed amendment to the "due-process" clause of State constitutions, providing that under certain conditions a statute which the court has held to contravene this clause may nevertheless stand if approved by popular vote.<sup>1</sup> In this form its novelty and injurious tendencies are not more conspicuous than its feebleness and inaptness. The power ostensibly given to the voters to do what the court regards as a deprivation of liberty or property without due process of law would be illusory; for the fourteenth amendment is expressly excluded from the project. And so, whether the "due-process" clause of the State constitution is amended in Mr. Roosevelt's way or in the ordinary way, or is repealed altogether, the unqualified prohibition against taking liberty or property without due process of law remains in force against both legislature and voters just as before. And the fourteenth amendment gives the court the same power and duty as before to render the objectionable decision. The whole project is thus reduced to a roundabout attempt to obtain a review of the decision in Washington, preceded by a popular demonstration against the court.

These features of the proposal make its local and temporary character pretty plain. One of its ablest advocates has described it as "a good weapon with which to stay the proposed recall of judges." Another might see in it a club to brandish before a particular tribunal. Such ends it may serve for the moment, but its tendencies for the future make it an ugly weapon to use; and they are precisely the tendencies against which Mr. Thayer's argument is directed.

This may be brought out by supposing that the proposed clause permitting the rehabilitation of legislation by popular vote after an adverse decision of the court were attached to the fourteenth amendment, where it would mean something. Logically and inevitably Mr. Roosevelt's proposal leads to this, whatever may have been its original purpose. Or suppose the business of protecting life, liberty, and property be intrusted to the States as of old, the fourteenth amendment repealed, and the referendum provision added to the "due-process" clause in the State constitution.

The merit of this plan as against the present method of constitutional amendment is a question which should not be confused by clamor about matters beside the point—such as the injustice of allowing a writ of error to the Supreme Court of the United States when the law is sustained and denying it when the law is overthrown—or difficulties unduly clogging constitutional amendment in some States—or the supremacy of the popular will. The lack of a proper appeal to Washington is due to a defect in the judiciary act, which may be remedied by a mere amendment of that act. If the procedure for amending the constitution is too slow or cumbrous in any State, all that is needed is to make it less so. The machinery differs widely in different States, and the right amount of deliberation to require before a change is permitted would be just as real a question under Mr. Roosevelt's plan as it is now. And as to the popular will, it is plain enough that when constitutional limitations, whether rightly construed or wrongly, prevent wise legislation which the community demands those limitations must give way. The question is why this

<sup>1</sup> Ransom, *Majority Rule and The Judiciary*, 115.

<sup>2</sup> A. M. Kales, 7 Ill. Law Rev., 153.

result should not be brought about by constitutional amendment in the regular way; and it is not hard to see that the demand for some other method is based on hostility to the very conception of judicial control over legislation.

Constitutional amendments in various forms will meet the difficulty. In the case of a workmen's compensation act, for example, such legislation, described in general terms, may be specifically authorized by an amendment to the "due process" clause. Or the disadvantages of such piecemeal amendment may be met, as Dean Ballantine has proposed,<sup>1</sup> by a broader declaration that the legislature may declare any business public and subject it to any regulations which do not preclude a reasonable return on the investment. Or the "due process" clause may even be repealed altogether as to legislative action and the citizen left to such constitutional safeguards as remain. Whichever be the form, no change is made in the system. The legislature still has absolute power within the range of permissible interpretation, and whether this limit has been overstepped is a question for the court.

Under the proposed system, on the contrary, the form of a constitutional limitation remains, but it is binding only to such an extent and in favor of such persons as the majority of voters may choose. The citizen thus has no rights which the legislature and the majority acting together are bound to respect.

In considering the merits of this project, an important feature of our present system must not be forgotten. As Mr. Thayer puts it:

Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence—the power of the judiciary to disregard unconstitutional legislation—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside. Our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality—of what the Constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. Meantime they and the people whom they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled as well as demoralized.<sup>2</sup>

Here is a real evil of our present system, outweighed nevertheless by its advantages. The "recall of judicial decisions" preserves and increases the evil, and throws away the advantages. The sense of responsibility in the legislature is still further diminished. Not merely is it tempted to shift to the court the question of constitutionality, but it is given the further relief of an appeal to the electorate as well. It might well "come about that laws would be passed simply for the purpose of having them declared unconstitutional, and then by a popular vote overturning the decision of the court."<sup>3</sup> So profound a distrust of the legislature is involved in the project that its supporters urge as an objection to the proposed New York amendment authorizing a workmen's compensation act that it may give the legislature *too much power*—in other words, that the legislature should not be trusted to go a step beyond the "due process" clause

<sup>1</sup> 19 Case and Comment, 229.

<sup>2</sup> Thayer, Legal Essays, 40n., 38-39.

<sup>3</sup> Roe, Our Judicial Oligarchy, 219.

as applied by the courts of appeals in the *Ives case* without a referendum on the details of the act. If our constitutional system is to be made over on the theory that even this meed of confidence is to be denied to our legislatures, they will indeed be "belittled as well as demoralized."

The function of the court is reduced to a preliminary step in a referendum, which is postponed until it shall appear by the court's decision that somebody's constitutional rights have been violated. When the court has declared that a litigant has rights, the voters are to decide whether his rights<sup>1</sup> (and those of others in like case) shall be respected. The systematic and consistent development of constitutional principles is left to the voters at the polls, but the court is to help them, performing its subordinate and advisory function in the apprehension of popular reversal and with a body of precedent made up of its own former decisions and the reversals thereof at the polls on appeal. A judicial decision on a point of private right is made the starting point of the referendum, and the courts reward for putting principle above popularity is a popular nullification of its decree. Such a measure is aptly contrived to strike at the dignity and independence of the judiciary.

The more violent, but more straightforward, method of abolishing altogether the court's control over legislation has healthier features. Such a step would be lamentable enough, but it would still leave an honest and rational system. It is the system which exists in England to-day, unsatisfactory as her colonists in Australia seem to have found it.<sup>2</sup> The Constitution would stand only as a declaration of principles addressed to the legislative conscience. The source of ultimate authority and the responsibility going with it would be clear. There would be no show of constitutional safeguards, general in terms and ostensibly enforced by the courts, but really meaning one thing for A and another for B, at the pleasure of the voters. At least there would be no attack on the conception of government by law.

It is not likely that the proposal could be adopted as to one part of the Constitution without its ultimate extension to others. This is not admitted by its supporters, from whom it comes in mild, if questionable shape,<sup>3</sup> but the conception of a constitutional system in which the validity of legislation is to be determined by the court as to one part and by popular vote as to another does not suggest permanency. Certainly the "police power" could not be made the line

<sup>1</sup> We are sometimes told that the project "has nothing to do with the 'decision' or judgment in any suit." (Ransom, *Majority Rule and the Judiciary*, 113.) If this is so, then a popular vote rehabilitating the workmen's compensation act after the decision of the New York Court of Appeals in the *Ives case* would have conferred the benefits of the act on all other injured workmen and left *Ives* alone without them. The justice of such a result is not apparent.

<sup>2</sup> The High Court of Australia continues to pass on the question whether an act "is a valid exercise of the legislative powers of the Commonwealth Parliament," and to treat as invalid legislation "not authorized by the constitution" (*R. v. Barger*, 6 Com. Law Rep., 41, 63, 81), following decisions of our own courts, and seemingly unaffected by the rather unintelligible opinion of the Privy Council in *Webb v. Outrim* (1907), A. C. 81.

<sup>3</sup> Advocates of the project have repeatedly insisted that it had no application to "specific clauses" of the Constitution, and that, for this reason, fears of legislation giving A's property to B without compensation—achieving social justice, perhaps, at the expense of the unduly rich by turning his private domain into a public playground—were groundless. But such conservatism seems to be already out of date in Massachusetts, where gentlemen of prominence are advocating a measure (house bill No. 1243) authorizing a "recall of judicial decisions" in all cases when a "law otherwise duly enacted by the legislative authority of the Commonwealth shall be held by the supreme judicial court to be in violation of the constitution."



of division, as some seem to have thought. This is merely to take refuge in the vagueness and error which surround that phrase, as if it imported some mysterious higher power not subject to constitutional restriction. As Mr. Thayer has said:

Discussions of what is called the "police power" are often uninformative from a lack of discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter—What are the limits of legislative power in general? In talking of the "police power" sometimes the question relates to the limits of a power admitted and fairly well known, as that of taxation or eminent domain; sometimes to the line between the local legislative power of the States and the Federal legislative power; sometimes to legislation as settling the details of municipal affairs and local arrangements for the promotion of good order, health, comfort, and convenience; sometimes to that special form of legislative action which applies the maxim of *sic utere tuo ut alienum non lædas*, adjusts and accommodates interests that may conflict, and fixes specific limits for each. But often the discussion turns upon the true limits and scope of legislative power in general—in whatever way it may seek to promote the general welfare.<sup>1</sup>

A boundary line incapable of definition would seem to lack the feature which makes it a boundary line. But since "that vast, unclassified residue of legislative authority which is called, not always intelligently, the 'police power,'" is, like all other legislative power, subject to the restraints of the Constitution, the proposal, rightly understood, must be to attach the proposed referendum to some specific constitutional limitation. If it is to be attached to the limitation which chafes the public will to-day, it will naturally be extended to that which chafes it to-morrow. As Mr. Root has finely said:

We must choose between having prescribed rules of right conduct, binding in every case so long as they exist, even though there may be occasional inconvenience through their restraint upon our freedom of action, and having no rules at all to prevent us from doing in every case whatever we wish to do at the time. We can not maintain one system in part and the other system in part. The gulf between the two systems is not narrowed, but greatly widened, by the proposal to dispense with the action of a representative legislature and to substitute direct popular action at the polls. A sovereign people which declares that all men have certain inalienable rights, and imposes upon itself the great impersonal rules of conduct deemed necessary for the preservation of those rights, and at the same time declares that it will disregard those rules whenever in any particular case it is the wish of a majority of its voters to do so, establishes as complete a contradiction to the fundamental principles of our Government as it is possible to conceive. It abandons absolutely the conception of a justice which is above majorities, of a right in the weak which the strong are bound to respect. It denies the vital truth taught by religion and realized in the hard experience of mankind, and which has inspired every constitution America has produced and every great declaration for human freedom since Magna Charta—the truth that human nature needs to distrust its own impulses and passions and to establish for its own control the restraining and guiding influence of declared principles of action.

EZRA RIPLEY THAYER.

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<sup>1</sup> Thayer, *Legal Essays*, 27n.

## **APPENDIX.**

### **THE VETO POWER OF JUDGES.**

[By F. E. Chipman.]

[From Legal Bibliography of October, 1912.]

How did our American doctrine, which allows to the judiciary the power to declare legislative acts unconstitutional and to treat them as null, come about, and what is the true scope of it?

This is the first paragraph of Prof. Thayer's essay on the "Origin and scope of the American doctrine of constitutional law."

Mr. Roosevelt has recently published an editorial in the Outlook (Aug. 31, 1912) entitled "The judges, the lawyers, and the people." The theme of his editorial is the danger of the nonpartisan nomination of judges. He expresses a hope that in New York the Progressives "will nominate the very highest type of man for judge," and that such nominee will "stand whole-heartedly for every feature of the Progressive platform as enunciated in Chicago." He refers, of course, to what is popularly known as the "recall of judicial decisions," or, as he expresses it, "the right of the people to determine for themselves whether the judges properly represent them in deciding a certain class of constitutional questions." His position appears to be that the New York Court of Appeals, in declaring the workmen's compensation act unconstitutional, dealt with a question "in no proper sense of the word judicial," but exercised "the very highest legislative power—that of the final decision as to whether the law can exist at all."

There was a time when this veto power was used with such wise caution as to avoid raising the issue of how to deal with the power when it was abused, but during the last few decades it has been used with a recklessness which has completely changed the whole bearing of the question. (Outlook, vol. 101, p. 1005.)

In the course of his editorial Mr. Roosevelt refers to legal essays by Prof. Thayer in the following words:

I wish that they would turn to the legal essays of Dean Thayer, the great dean of the Harvard Law School, and read the first essay—that on constitutional law. Let them study what Dean Thayer therein says, and what he quotes from judicial opinions rendered 50 and 100 years ago in this country, as to the extreme unwisdom of the use and abuse of this power by judges with the recklessness characterizing its use and abuse of recent years.

Prof. Thayer's essay was first read as a paper before the Congress on Jurisprudence and Law Reform, on August 9, 1893, at its meeting at the World's Fair in Chicago. At that time the recall of judicial decisions was not even a mooted question. The scope of the judicial power in passing on the constitutionality of legislation was a question

which he deemed of peculiar importance, and he discussed it further in his biographical sketch of Chief Justice Marshall (John Marshall, Riverside Biographical Series; Houghton, Mifflin & Co., 1901).

This power, at first strenuously denied, at last was everywhere established, but the courts regarded it as a judicial one. They held that the legislature had only delegated and limited authority under the Constitution; that these restrictions were so much law, and to be operative they were to be interpreted by the court.

There is no doubt but that Prof. Thayer foresaw the criticism that the courts are now subjected to. He undoubtedly felt that a reform must come about. We doubt, however, that if the idea of a recall of judicial decisions had been suggested to him he would have considered it, and we are quite sure he would have seriously objected to having his writings used in support of such a position. On the other hand, he would undoubtedly have approved of the action of the American Bar Association in repudiating the idea, and would have heartily subscribed to the words of its committee:

The breaking down of constitutional safeguards does not come by open attack upon free institutions, but under the guise of the popular will. Such encroachments of power in the assumed interests of popular reform are the most subtle and dangerous of all. Do not let the courts become the subject of attack by every disappointed litigant, envious lawyer, or domineering political boss.

We believe that the courts have not sought to interfere with legislation, but have been forced to do so. The fault lies with the people, the American sovereigns, not the courts. The people, by their legislative representatives, are to blame.

The people, all this while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts slip in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives. (Thayer's Marshall.)

To illustrate by an extreme case. Recently an act was passed regulating the operation of motor vehicles on public streets. One section of the act, as published in the official edition of the session laws of the State, concluded with the following paragraph:

Nothing in this section shall be construed as in any way preventing, obstructing, impeding, embarrassing, or in any other manner or form infringing upon the prerogative of any political chauffeur to run an automobilious band wagon at any rate he sees fit compatible with the safety of the occupants thereof: *Provided, however,* That not less than 10 or more than 20 ropes be allowed at all times to trail behind this vehicle when in motion, in order to permit those who have been so fortunate as to escape with their political lives an opportunity to be dragged to death: *And provided further,* That whenever a mangled and bleeding political corpse implores for mercy, the driver of the vehicle shall, in accordance with the provisions of this bill, "throw out the life line."

Undoubtedly Prof. Thayer would, in the main, have agreed that the people, not the courts, are to blame. He concludes his essay, which Mr. Roosevelt cites as an authority in support of his position, by saying that he has—

no doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the Constitution allows. And, moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they



say, the courts will correct it. Meanwhile they and the people whom they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled, as well as demoralized. If what I have been saying is true, the safe and permanent road toward reform is that of impressing upon our people a far stronger sense than they have of the great range of possible mischief that our system leaves open, and must leave open to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.

We believe that the judiciary, for whom we have the greatest respect and admiration, seek wherever possible to avoid passing upon these questions. They realize that no questions, to use the language of Chief Justice Marshall, "can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

F. E. CHIPMAN.

















**MINIMUM WAGE**

**(Pamphlets 35 to 39).**



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**MINIMUM WAGE**

**(Pamphlets 35 to 39).**



35.

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# THE MINIMUM WAGE

WITH PARTICULAR REFERENCE TO THE LEGIS-  
LATIVE MINIMUM WAGE UNDER THE  
MINNESOTA STATUTE  
OF 1913



By **ROME G. BROWN,**  
Minneapolis, Minn.

[2nd Print]



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# *THE MINIMUM WAGE*

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*With particular reference to the Legislative Minimum Wage under the Minnesota Statute of 1913.*

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*By ROME G. BROWN,  
Minneapolis, Minn.*

## SCOPE OF THIS DISCUSSION.

The enactment of a minimum wage statute in Minnesota makes necessary a present and local discussion of the minimum wage question. Such legislation necessarily affects the interest of all employers and of all employes, which two classes comprise substantially the entire citizenship. Before its attempted application as a legislative measure in this state, local interest in the question was naturally confined to those who happened to interest themselves in its study as a doctrine discussed by students of ethics, economics and history. As is true in the case of most reform measures, its advocates have been most active, and, for the reason that it has been put forward as a social welfare measure, most persuasive. Whether it be, in fact, expedient, from either an economic or legal viewpoint, it is safe to say that its enactment in Minnesota, particularly in the form of the Act of 1913, was not due to any well-considered or deliberate judgment of the legislature nor of any considerable number of its members, and furthermore that it was not demanded by any stress of public opinion founded on prevalent conviction resulting from any general, deliberate consideration or study of the merits or demerits of a legislative minimum wage. The general mass of citizens of the state first knew of the enactment,—and even learned for the first time that there was a minimum wage doctrine, or at least a doctrine of a legislative minimum wage,—when, after the 1913 session, they discovered the present statute among those which had been passed by the legislature.

The Minimum Wage Commission authorized by that statute has been organized, and it is proposing to establish a minimum wage as to certain occupations, preparatory to enforcing the compulsory features of the statute. The Commission has established an Advisory Board to inquire into and to recommend a minimum wage for the mercantile occupations in the cities of Minneapolis and St. Paul. The first questions with which such Advisory Board was confronted were as to the practical workability of the statute, the power and authority of such Advisory Board and of the Commission, under the complex and seemingly contradictory statutory provisions, to fix a minimum wage for particular occupations, or for particular localities, or for particular classes of persons, evidently intended to be covered by the statute; also, the basis of computing such minimum wage under varying circumstances or for different classes of employes; also the enforcibility of the act. These and other questions must be answered before proceedings could begin; and the questions propounded to the legal department of the State by that Advisory Board evidenced the difficulties which were encountered at the very outset.<sup>1</sup>

It may be said that these questions precipitate local discussion of the minimum wage in this state. The immediate question is the practicability of the present Minnesota statute. A discussion of this question, however, leads to a broader field of discussion; because the practicability of a particular minimum wage statute cannot be well understood without some general understanding of the subject of the minimum wage in its general phases. Such general information should be had by both classes of citizens affected, by both employers and employes. It should be had, too, by the public as a whole, at least in its general aspects. The more technical phases of the question, the economic and the legal phases, should be carefully considered by those upon whom the duty devolves to enforce, so far as enforcible, the law stated in the terms of the statute.

The primary object of this discussion, then, is to present the question of the legislative minimum wage as proposed by the present Minnesota statute. But in order to approach that question intelligently, it is necessary to discuss briefly the gen-

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<sup>1</sup> See Appendix II.

eral question of the minimum wage, and more particularly that of the legislative minimum wage.

It is not within the scope of this discussion to detail or examine the various theories of writers upon economics who generally stand as authority against the doctrine of a minimum wage. Their studies involve discussions of the old and to some extent repudiated doctrine of the wage-fund, the doctrine of the paramount law of supply and demand and that theoretical antagonism to any interference by paternal legislation with the economic laws of trade, including the relations between employer and employe, denoted by the well-known economic doctrine of *laissez faire*. It is sufficient for the present purposes to say, that it is generally recognized that the obstructive influence of these economic doctrines to practical interference by the State in the interests of social welfare, is growing less and less. Actual experience has shown that, within certain defined limits, legislative protection, theoretically inconsistent with certain supposedly established economic theories, to certain classes of citizens who, by reason of their situation in life, are less able to protect themselves, is not only feasible, but has been followed by salutary results. The dogmas, therefore, of the economic doctrinaires are not necessarily controlling for the mere reason that the practical application of legislative protection presents conflicts with this or that theory of economic law.

It must be admitted that there is a breaking down of the full force and effect once theoretically ascribed to certain stereotyped doctrines of the economists. This fact must be recognized in any helpful discussion of the subject. Practical enlightenment can best come from the comparatively modern studies which have been presented as to the practicability of the minimum wage as a subject of legislative compulsory enactment. These modern studies of the subject have been sometimes by those who view the questions involved as purely ethical, and who assume that beneficial results will be accomplished only through voluntary co-operation induced by a higher regard for moral duty and a better appreciation of ultimate benefits, effective only through sacrifice of selfish interest in behalf of the welfare of others.

Another viewpoint of discussion is that of the purely scientific student who assumes the establishment of a minimum wage, either by voluntary co-operation or by legislative compulsion, and who, in advance of its establishment, presents the possible advantages or disadvantages of its application to either the employer or employe, or both. Such student views the question as one more purely of economic law.

Then there is a third phase of the discussion which involves not only questions of ethics and of economic law,—that is, both the moral and the scientific viewpoints,—but also questions of constitutional law. The questions involved in this third phase of the discussion are at present the most pressing; but they cannot be intelligently presented nor understood without some consideration of the ethical viewpoint and particularly of the economic questions necessarily involved. Some consideration also is necessary to be given to the history of the agitation for the minimum wage.

Therefore, before taking up the legislative minimum wage, I will call attention briefly to a consideration of the subject of the minimum wage, first from the ethical and next from the economic viewpoints.

#### THE MINIMUM WAGE AS AN ETHICAL MEASURE.

It is unnecessary to discuss the advocacy of the minimum wage made by that class of social and political antagonists to restraint from either constitutional or economic law who represent modern socialist doctrines. The socialist demands as a matter of fundamental human right the equal division among all citizens of the state of an ownership or direct property interest, not only of all private and public property within the jurisdiction of the State, but also of all profits, revenue and proceeds therefrom. Both the theory and practice of wages as such are repudiated as a part of a prevailing fundamental system of injustice. An orthodox socialist could not, therefore, be a consistent advocate of the minimum wage. The socialist spirit of compulsory division, of disregard for economic law, and of defiance of constitutional restraint, has, however, pervaded the advocacy of the minimum wage, in so far as it bases the absolute right to a minimum wage,—computed by the full

measure of the necessities of living in comfort and in health, —upon the mere fact of the existence of the wage earner, regardless of his efficiency, regardless of his wage-earning ability, regardless of the benefits of his labor to his employer, and regardless of every other consideration. Such advocacy of the minimum wage is but one phase of a socialistic attitude, demanding concessions and even division of property and income, on the theory that the fact alone of possessing life entitles its possessor to share in all other possessions or advantages held by other living beings. In justice to Father Ryan, it should be borne in mind that while he is an extreme advocate of the minimum wage, particularly upon ethical and religious grounds, he is an active antagonist of the socialist system.<sup>2</sup>

In the purely ethical phases of the question there is little field for contention; because this, as any question of ethics, involving the abstract question of duty, of right and wrong, of charity, of benevolence, of sacrifice for others, becomes from its ethical viewpoint more like a question of religion. It must be solved in fact by each individual or each community of individuals according to the dictates of conscience. The means for accomplishing beneficial results are enlightenment and moral suasion, inducing so far as possible voluntary co-operation and thereby bringing promised benefits in proportion to the extent of the co-operation secured. Such ethical advocacy of the minimum wage is based on an assumed right of every person to have and receive that certain amount of material goods which is sufficient to afford him a decent livelihood; that this right is a moral right, based on his intrinsic worth as a person; and that it is a right as valid, even if of less importance, as his right to life. It is said that the laborer's right to a living wage is but the specific form of his generic right so belonging to every person.<sup>3</sup>

With such advocates the question involved is one between the method of unrestricted bargaining as to wages and a "professedly ethical standard."<sup>4</sup> Economic law is an abstract bogey

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<sup>2</sup> See Debate on Socialism between Morris Hillquit (affirmative) and John A. Ryan (negative) in October, 1913, and following numbers of *Everybody's Magazine*.

<sup>3</sup> "A Living Wage, Its Ethical and Economic Aspects," by John A. Ryan, published by McMillan Co., New York and London, 1912, Chap. XIX, page 324.

<sup>4</sup> "A Living Wage," page 22.

with which the question has no real relation, because moral forces may overcome the forces of economic law, and in any event the moral right of the laborer is paramount to the economic rights of the employer, whose moral duty to his employe is gauged by the asserted moral right of the latter. "As a determinant of rights, economic force has no more validity or sacredness than physical force." The employer's right to any return on his investment is subordinate to the laborer's right to receive from him a living wage.<sup>5</sup> The living wage doctrine, then, to this class of advocates, is an ethical question and even a question of purely religious ethics; and the remedy to be thereby accomplished is to be brought about through moral suasion addressed to individuals, furthered by organized effort. "There must be an appeal to the minds and hearts of individuals and the fullest utilization of the latent power of organization and social institutions."<sup>6</sup>

The ethical advocate, also, recognizes no practical obstacle to the establishment of a minimum wage arising from the forces of economic law. He casts aside such opposing forces as non-existent because in practice they will be found to be actual only in the minds of the abstract economists; or, if it transpires that they are real, then any disastrous economic result should be submitted to because of the paramount nature of the moral or ethical law establishing the right to the minimum wage. Voluntary recognition of this right and co-operation in the establishing of the minimum wage should be brought about by persuasion and by organization. Compulsory submission can be only brought about indirectly by influence and example. In short, to the ethical advocate, the minimum wage can be established only to the extent that voluntary cooperation may be induced. A preliminary requisite to any legislative minimum wage would be necessary changes in the federal constitution and in the constitutions of the several states, and these necessary changes would be very difficult to obtain.<sup>7</sup>

The foregoing summary of the advocacy of the establishment of a minimum wage through the general recognition of a moral

5 "A Living Wage," pages 10, 326, 261.

6 "A Living Wage," page 34, page 331.

7 "A Living Wage," page 313. Also "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, page 52, in *Annals of American Academy and Political and Social Science*, July, 1913.



or religious right or duty is of more than incidental interest. Its urgency of co-operation as a means of accomplishing the benefits to low-paid labor suggests a practical means of obtaining beneficial results through the minimum wage. It is evident, as I shall show further on, that, wherever conditions have been improved by the establishment of a minimum wage, even in connection with legislative enactments, the compulsory features of such enactments have not been so much directly ameliorative of the status of the laborers as they have been a moral and practical assistance in encouraging organized co-operation. It was for that reason that the first minimum wage statute adopted by any of the United States was not made compulsory upon any employer. The Massachusetts act of 1912 makes the State Wage Commission simply a board to investigate and recommend a minimum wage as to any occupation; and while, even then, the statute provides for notice and hearing to the employers to be affected, and for review by the courts of any recommendation made by the Commission, it provides no penalty. It empowers the Commission to report and to publish its recommendations with the names of the employers who do not submit to the recommendation made. By such statute the State becomes an additional means of promoting co-operation, not only among employers, but between employers and employes in raising the wage of the lower classes of labor to a living wage. It adds to the efforts for amelioration by purely individual initiative and by privately organized co-operation, the encouragement and assistance of investigations and recommendations made under official authority. It naturally results in bringing in line with the employers of more humanitarian tendencies those who, from avarice, neglect or indifference, would remain inactive without some such stimulating incentive.<sup>8</sup> The Massachusetts example was followed by Nebraska in the enactment of the minimum wage statute of 1913 in that state.<sup>9</sup>

The minimum wage by voluntary co-operation, including that of the State through non-compulsory statutes, is altogether, as it must be admitted, a logical, workable measure. Whether we agree that it is properly based upon the natural and par-

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<sup>8</sup> Massachusetts Minimum Wage Statute of 1912, as amended in 1913. See Appendix III.

<sup>9</sup> See Appendix III.

amount right of a laborer to receive, and the controlling duty of the employer to provide, in all instances a living wage, is unimportant. Its object is beneficent; it is humanitarian, and as such its accomplishment must be recognized as desirable, so far as any concrete beneficial results are not necessarily attained at the expense of other resulting disadvantages of greater importance.

The preservation of the voluntary element, however, is the means through which are obviated many of the obstacles to the practical working of a compulsory minimum wage. Under the system of voluntary co-operation, employers cannot be driven out of business; neither will the prices of their products be increased so as to deprive the recipient of a minimum wage of its benefits; neither will the minimum wage tend so much to become the maximum wage. Under a system of co-operation, the necessary adjustments, more in accordance with the natural economic law, will be worked out, and thereby artificial and unfair discrimination between competitors in the same industry will tend to be obviated.

The argument for the voluntary co-operative establishment of a minimum wage, whether as an ethical or a humanitarian measure, is far from answering the objections based upon economic and constitutional grounds to the expediency or practicability of a legislative minimum wage.

#### THE MINIMUM WAGE AS AN ECONOMIC MEASURE.

There are certain rules of economics which, when formally expressed, are merely the statement of certain natural laws of industrial science and of the science of trade and commerce. Such economic laws are controlling in the same way, even if not to the same extent, as natural laws of physics are controlling in respect of the phenomena of nature to which they are applicable. Disregard or violation of such natural law, whether it be economic or physical, tend in all instances to cause, and in many instances inevitably cause, disturbance and even disaster.

Sometimes the disturbance is merely local or temporary, and its effects may be overcome or remedied by either natural or

artificial adjustments. When, therefore, a course of action is proposed which from its very nature is in conflict with natural economic laws, it is wise to proceed with caution, lest the resulting disturbance bring injurious effects greater than the proposed or possible benefits. The solution of any such question cannot be based solely upon the desires, necessities or the resulting benefits to any particular individual, nor, indeed, to any particular class of individuals. There is no system of governmental or industrial organization or policy which can be so perfectly organized and administered that, with all their varying talents, degrees of efficiency or of frailty, can act with equal benefit to all persons; or which even can fail to leave some individuals or some class of individuals not only without benefits, but with comparative disadvantage resulting from the system itself. The rule of measure of merit is "the greatest good to the greatest number." This is a rule not only of ethics and of economic law, but also of the law of governmental and legislative policy.

Any artificial interference with the wages to be paid to labor *in private employment* is an interference with the natural economic law of supply and demand. It is also an interference with the natural economic law of industrial competition. This is true as to the compulsory establishment of a wage for labor, whether the fixed wage be a minimum or a maximum. A compulsory minimum wage, whether computed upon the basis of a sum adequate to provide a decent livelihood with reasonable comforts, or upon any other basis, has inevitably the tendency, to say the least, and, it must be admitted, in some cases it has the necessary effect, to disturb the natural conditions governed by the law of supply and demand, by the law of competition and by other economic laws.

From this fact there have been urged with greater or less reason, and by some as insuperable, certain economic objections to a compulsory minimum wage, as presenting obstacles to its successful application in the modern industrial world. Examination of some of these objections will throw light upon the subsequent discussion with reference to the legislative minimum wage as applied in this country.

## ECONOMIC OBJECTIONS STATED.

1. The first objection is, that it necessarily creates an artificial discrimination in any occupation or industry to the disadvantage of those employers subject to the fixed wage, and in favor of others who are competitors. A federal minimum wage statute would be impossible without changing our system of government and by amendment of the Federal Constitution. Such an amendment would forever do away with the well-established principle that there should be and has been reserved to the several States all the powers of self-government and of legislation touching internal affairs and business and the relations between their citizens which are not properly powers of federal control and as such expressly imposed upon the federal government. So far, then, as concerns a minimum wage, the United States comprises forty-eight separate, competing sovereign countries with widely varying conditions of employment and wage standards.

The market for products of state industries, however, is not only nation-wide, but world-wide. In many industries the margin of profit is so small that with the slightest disturbance of their extra-state market, the industry could not survive. If wages which are now fixed by competition and by the law of supply and demand were artificially raised in one locality, the competitors in other localities would control the price of commodities and shut out of business those whose wage-rate was artificially kept above the rate made by their competitors.

For the same reason similar results within a state would follow upon the enforcement of a minimum wage fixed for one city or locality, or for one class of cities or localities, as against a different wage for other localities. An artificial discrimination would be created as to any particular occupation or industry against the localities with higher wage and in favor of those with a lower one. Nevertheless, the minimum wage statute generally contemplates just this sort of discrimination between different localities in the same state. The fact that the cost of living is different in different localities is not a justification for a lack of uniformity in the minimum wage. The employer

in the industries located in the larger urban localities, while at a disadvantage with the higher minimum wage based upon the greater local cost of living, has the advantage of better transportation and market facilities; whereas, the employer in the country, with a less minimum wage than where the cost of living is more, has the disadvantage of his less central location, poorer transportation facilities and less advantageous market. The actual cost of production does not vary with the cost of living of the employe.

A state compulsory minimum wage, therefore, based upon the cost of living necessarily results in artificial and unfair discrimination. And this is true, even if fixed wages were established for the same industry or occupation throughout the state. But the result is even more disastrous when it is proposed, as under the present statute, to establish a minimum wage as to a certain occupation in one locality without at the same time interfering in any way with the wage in the same occupation in another locality.

The discrimination resulting is all the more obnoxious to those industries in states where the margin of profit has already been cut by the establishment in practice of a higher wage rate than similar industries pay in other states. For instance, Massachusetts is near the head of the list of states in high wages. A still further raise of wages there, by compulsion, would create against the industries of that state a discrimination more serious than it would be in a state having already low wages. It would be a penalty upon that locality whose citizens by co-operation had raised the standard of its employes. The same effect would be produced upon the industries, and particularly the mercantile houses, of St. Paul and Minneapolis. While in some instances the wages are below what they might be, the mercantile houses of the Twin Cities are marketing their goods at a higher per cent of wage cost than any other city of their size in the United States. Through their mail order departments they are direct competitors in the same industries with the merchants of other large cities who pay less wages.

Discrimination, which is unfair and which would tend to become destructive of industry, is, therefore, a valid economic

objection to a compulsory minimum wage.

2. The compulsory minimum wage would also necessarily tend to, and in many instances would, drive employers out of business, by destroying profits or by turning profits into losses. This would be the result of the artificial discrimination between different localities, already noted. It would also be the natural result even where there was no local discrimination. From varying conditions affecting different industries, the margin of profit varies greatly. Many employers are already so near the restrictive limit of profit that they could not continue if additional expense were added by increasing wages by compulsion. We may view such destruction of business as economically wrong, and we may view it as resulting in the taking of property for the benefit of the employe class without due process of law. The force of both these views is recognized by the advocates of the minimum wage who base the right of the employe to have from his employer at least a certain wage upon the generic right of the employe to receive, and the corresponding duty of the employer to furnish, at least a minimum living wage, and makes that right of the employe paramount to any right of the employer. But, they argue, if the result is to "drive any employer or any industry out of existence, the tendency should be welcomed." The employer, individual or corporate, who may be unable to survive, and whose income from his investment is destroyed by enforcement of the minimum wage, is relegated to the class of undesirable citizens or of "soulless trades" whose extinction, as "social parasites," should be hastened.<sup>10</sup>

3. Another inconsistent result, due to the inevitable working of natural economic laws, is that the general enforcement of a minimum wage in any industry would necessarily result in increase in the price of the product or wares in the market. Such rise in prices would increase the necessary cost of living, which cost is to be the basis at which the minimum wage is maintained. Experience has shown that increase in price is generally greater than a proportionate increase in the expense,

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<sup>10</sup> "Minimum Wage Legislation," by John A. Ryan, *Catholic World*, February, 1913. Also, *Annals American Academy Political and Social Science*, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, page 45.



by reason of which prices are raised. The uncertainty of application of the compulsory minimum wage has to be guarded against and on account of that hazard the rise in prices would naturally be greater than that warranted at any particular time by the then arbitrary increase in expense. The resulting change in the cost of living calls for a further increase in the minimum wage and that in its turn results in a further increase in the cost of living; and so, at least to certain limits, the tendency is to establish a sort of automatic lever acting at recurring intervals constantly towards a rise not only in wages, but also in prices, with the rise in one direction counteracting the effects of the rise in the other.

That this is the necessary tendency, and to some extent the inevitable result, of a compulsory minimum wage, is admitted by its advocates. They say, however, not without reason, that the menace of such an effect is not as great in practice as indicated by theory. The laboring class, much less that portion of it directly affected by the minimum wage, does not constitute the entire class of consumers. The effect, therefore, on prices, they say, would not be to the fullest extent claimed by those who urge fully these economic objections. The distinction thus made seems to be sound; but in any event it has to be admitted that the resulting tendency would be to eliminate the beneficial effect upon the laborer of the minimum wage and to unsettle the basis upon which such wage is from time to time computed.

A part of this same objection is, that the increased prices would, under economic laws, result in decreased demand for the product or wares in question and thereby diminish production. Diminished production in its turn is necessarily followed by diminished employment; and thus again the artificial interference with the natural law of supply and demand would in this instance result in an artificial increase of the number of unemployed; thereby decreasing, if not eliminating, the ultimate benefits to the laborer of a compulsory wage.

4. Again it is objected that the minimum wage, established by compulsion, while it might raise the wages of the lower classes of labor, would at the same time lower the higher wages paid under the present system to the higher classes of labor.



In other words, the minimum wage would tend to become the maximum wage. This question was much discussed during the last political campaign in connection with the Progressive party platform for a minimum wage for women, to be established by authority of the states and the federal government. President Wilson, in one of his campaign arguments, said with reference to this question:

"If a minimum wage were established by law, the great majority of employers would take occasion to bring their wage scale as near as might be down to the level of the minimum; and it would be very awkward for the workingmen to resist that process successfully, because it would be dangerous to strike against the authority of the federal government."<sup>11</sup>

The only logical remedy to obviate this and many of the objections to the minimum wage would be the impossible one of establishing by law a general minimum wage scale for all classes of wage-earners.

That the compulsory minimum wage would threaten existing trades union scales and the present standard of wages for all classes of labor, has been shown by the experience in Australia, where the tendency is for the established minimum wage soon to become the standard wage scale. The class of unthinking employes, as well as their voluntary protectors who are apparently uninformed of the economic significance of a statutory wage, overlook this objection. The skilled students of labor questions, including labor leaders of experience, agree that the warning given by President Wilson is well founded. The San Francisco Labor Council recently declared itself "opposed to the principle of establishing the rate of wages, whether for men or women, by legislation." Samuel Gompers, President of the American Federation of Labor, while favoring a living wage, opposes a legislative or compulsory minimum wage for wage earners in private employ. He says: "I recognize the danger of such a proposition. The minimum wage would become the maximum, from which we should find it necessary to depart."<sup>12</sup> Mr. Gompers also has stated with reference to the compulsory

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<sup>11</sup> "The Legal Minimum Wage," by James Boyle, Forum, May, 1913.

<sup>12</sup> "The Legal Minimum Wage," by James Boyle, Forum, May, 1913.

minimum wage: "I fear an outcome that has not been discussed, and that is, that the same law may endeavor to force men to work for the minimum wage scale, and when government compels men to work for a minimum wage, that means slavery."<sup>13</sup>

The objections, then, to the minimum wage are not all from the side of the employer.

5. Still another objection which involves many and varied difficulties is the fact that the compulsory minimum wage will not only throw out of employment entirely a large class of laborers dependent in whole or in part upon their earnings, but will maintain a barrier against the possible employment of all labor whose efficiency is below the standard of those entitled to the fixed wage. The employer cannot be compelled to, and he certainly will not voluntarily for any extended period, keep in his employ one whose efficiency is not up to or does not closely approach that measured by the minimum wage. Those below that standard would be gradually weeded out and afterwards kept out of employment. Under the present system those receiving a less wage than sufficient by itself to amount to a full living wage as defined, comprise generally those whose training, skill and experience are insufficient to enable them to give in return a service warranting the compensation of such wage. They comprise also those who by reason of indolence or other peculiar characteristics, inaptitude or indifference, can never reach the standard of accomplishment measuring up to the minimum wage. There are also those who, by reason of advanced years, fall below the standard required for the fixed wage. Then there are the hosts of those to whom employment in their earlier years is the main education and preparation for the power to earn, and whose employment for considerable periods at merely nominal or at comparatively low wages provides for them the means, or assists them in the means, of sustaining life while in the preparatory stages for their later work. Excluded altogether from employment by reason of the minimum wage, they would be compelled at their own expense of time and money to school themselves to the point of efficiency

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<sup>13</sup> E. F. McSweeney, in *American Labor Legislation Review*, February, 1918.

measured by that wage. These and other classes would be barred from any wage-earning opportunity, some of them permanently and some of them for long periods of time; and this deprivation of advantage would be accompanied by the burdens of preparation now shared between the employer and the employe.

It is true that the legislative minimum wage generally contemplates exceptions in favor of the weak, the aged, or those otherwise physically incapacitated. The scheme does not, however, provide in any way for the great mass of the unemployed which will be created and increased by its adoption. For this reason alone the results must be disastrous, at least until the same paternal government which has provided the minimum wage shall have provided for those who are thereby subjected to disadvantage and even to disaster. At the same time that the slow or inefficient or infirm worker is driven out of industry altogether into want and even pauperism, with the consequent deprivation not only to himself but to those dependent or partially dependent upon him, neither he nor those of his class can in this country ever look to a gradual betterment of their condition. The immigration of the lower class workers from Europe will continue to swell the hordes of the unemployed in this country. The arbitrary law of compulsory minimum wage, violating the law of supply and demand, will have the effect, as to every class of labor for whose benefit it is proposed, to decrease the demand at the same time that it multiplies the supply. The inevitable result must be such a lack of balance and adjustment in the social and political forces of the nation that catastrophe will follow. No remedy or prevention for the result of the over-strain of natural forces will be found.

#### PREREQUISITES TO A LEGISLATIVE MINIMUM WAGE.

Too many advocates of the minimum wage assume that it lies within the power of the State, through its legislature, to furnish a panacea for all evils experienced under the present wage system. They and their proposed beneficiaries assume that, once

the Government fiat has been issued in legislative form, then immediate relief for all the lower classes of labor will come in the form of wages sufficient to maintain them in health and comfort. They do not consider, and if they do they blindly disregard, the inevitable workings of the natural law of economics which from its very nature will not of necessity yield to statutory law. There are certain laws of nature, economic as well as physical, which are and will remain paramount to human, statute law. They are Nature's limitations upon the legislative power of man, and as such they are paramount law, without being subject to amendment, even more controlling than the written prohibitions of our Federal Constitution are controlling upon the legislative power of the federal and state legislatures. Any state which sets up an artificial standard repugnant to economic law must, if it hopes ever to establish and enforce such standard, provide in advance for the necessary readjustments inexorably demanded by the natural law which is infringed, and for the remedies of evils incident to the displacements resulting from natural forces.

The resulting evils of the enforcement of a compulsory wage standard, due to economic laws, have just been pointed out. They suggest the protective provisions desired and measures for which, so far as the State has the power, it would be the duty of the State to provide. The army of workers, male and female, with their families dependent upon them, who suffer from old age or from other misfortunes to which wage earners are liable and against which they have not themselves been able to make adequate provision, including those who by the minimum wage are relegated, perhaps forever, to the class of the unemployed, should be insured in some way by the State against the disasters of such misfortunes. Such insurance may include (1) an adequate system of workmen's casualty compensation; (2) organized illness insurance, cooperative or obligatory to the extent of the legislative power of the State, including invalidity and old age benefits.

One of the greatest needs for preliminary measures would be (3) providing for the misfortune of non-employment, through official and thoroughly organized employment exchanges, with bureaus collecting and reporting data with refer-

ence to the employment needs of the different occupations and the number and locality of various classes of employes. Such organized efforts in behalf of labor have been established in England, including even insurance against unemployment made obligatory upon a large class of employes and industries.

The next of the most important reforms to accompany or to precede minimum wage statutes should be (4) a comprehensive system in industrial trade education and for vocational guidance. These should be made not only a part of the public school system, but should be made the subject of special schools open to all present and prospective wage earners. By such means may be acquired, with less loss to the worker, that efficiency which shall measure up to the standard of the established minimum wage. The State has no right to bar from employment the worker of less than ordinary ability, or to deprive him of paying for his tuition by a diminution of his wages through his preparatory period, as would be done by the compulsory minimum wage law, without providing, to some degree, at least, a substitute for the advantages of which he is deprived.

Incidentally, also, (5) should be the enactment and enforcement of proper eugenic laws, in order to diminish the perpetuation of defective traits, physical or moral. Next (6) should be retained, and if necessary, extended in scope, the present system, so far as proper, of protective labor laws limiting the age of children workers, and protecting not only children but also women and men as to hours of employment in dangerous or unhealthy occupations and as to sanitary and healthful conditions in all occupations. These are all necessary to promote efficiency and to diminish the tendency of the minimum wage law to increase the number of unemployed.<sup>14</sup>

But of primary importance as a preliminary remedial measure (7.), there must be more effective and more stringent restrictions upon immigration. All other reforms for the advancement of the employe and for the care of the unemployed will be worse than futile, while the gates at Ellis Island pour into this country a constantly arriving horde of the lower class of wage earners from Europe and other foreign countries. So

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<sup>14</sup> Annals American Academy Political and Social Science, July, 1913, page 8; "The Minimum Wage as Part of the Program for Social Reform," by Henry R. Seager, Professor of Political Economy, Columbia University.

long as the army of the unemployed and of the incompetent is recruited through the present unrestricted immigration, the evil results, due to economic laws, of compulsory minimum wage will be increased and intensified. More than that, all attempts at remedies or readjustments, whether by the State or by organized co-operative effort, will be rendered futile.<sup>15</sup>

When these reforms are set in motion and made effective, and only then, would it be possible to expect any substantial benefits from a compulsory legislative minimum wage. These considerations are entirely apart from the question of the practicability of any particular minimum wage statute, or of the constitutional power of the legislature to pass and have enforced any particular statute, or a minimum wage statute at all.

#### THE EFFICACY OF PROMOTING CO-OPERATION.

To these objections upon economic grounds above enumerated might be added many others which have been urged; but these are sufficient to show that the advisability of a compulsory minimum wage, though based upon a living wage, is not a self-evident or self-supporting fact. The questions involved are far-reaching. The objections shown by a consideration of natural economic laws are serious questions, to say the least. They must be answered satisfactorily before it is demonstrated that a compulsory minimum wage is either a practicable or wise policy. The economic objections do not apply to the same extent to a non-compulsory minimum wage,—that is, one which is worked out by individual and organized co-operation, or where even under a legislative minimum wage the practical effect is only to promote voluntary co-operation,—as they do to a compulsory wage in the United States. The success claimed for the minimum wage in New Zealand and Australia is not at all a conclusive answer. It has been in operation there only during times of prosperity. It must be considered an experiment until it is demonstrated that such laws can stand the stress of adversity. Neither has its success been demonstrated by the experience in Great Britain, where the

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<sup>15</sup> *Annals American Academy Political and Social Science*, July, 1913, page 66: "Immigration and the Minimum Wage," by Paul U. Kellogg, Editor of *The Survey*.



minimum wage has been applied only to a few sweated industries and also to workers in mines. The British expert, Mr. Ernest Aves, after a thorough investigation in Australasia, reported to his government as follows:

“The evidence does not seem to justify the conclusion that it would be advantageous to make the recommendations of any special Boards that may be constituted in this country legally binding, or that if this power were granted it could, with regard to wages, be effectively exercised.”<sup>16</sup>

How much more difficult, then, would it be in this country, where the statutes of its legislatures are not at the same time the fundamental constitutional law. The question before the British Parliament as to a minimum wage statute was alone a question of policy or expediency. In this country the same question is involved and always at the same time the question of consistency with our system of government, expressly limiting legislative powers of the states or of the nation as against infringements of the right of contract, of personal liberty, and of the preservation of property rights.

Another reason, as stated by Mr. Aves, for the inapplicability of the experiment, as applied in New Zealand or in Australia, to a country like Great Britain or the United States, is the fact that there only a comparatively small number of workers have been or were intended to be affected by the minimum wage. So small is their number, he says, that it is “as though the whole machinery of propaganda and of the government were concentrated on a city somewhat smaller than Birmingham.”<sup>17</sup>

Mr. Aves says, too, referring to results in New Zealand and Australia, that under the minimum wage law men find great difficulty in retaining situations when they pass middle age; and it becomes harder for the slow or inefficient worker to get a job, as the employers will not pay them the legal wage. Referring to the system in Victoria, the Massachusetts Commission on Minimum Wage Boards says that:

“These special boards, although authorized to secure a ‘living wage,’ in practice have served rather to formulate common rules for a trade, to bring employes and employ-

<sup>16</sup> “The Legal Minimum Wage,” by James Boyle, Forum, May, 1913.

<sup>17</sup> “The Legal Minimum Wage,” by James Boyle, Forum, May, 1913.



ers into co-operative rules and to provide suitable machinery for the readjustment of wages and other matters to changing economic conditions."<sup>18</sup>

The system as so administered is not considered antagonistic by either the propertied interests or the employer.

Thus far, therefore, so far as the practical application of the compulsory minimum wage is concerned, any practical beneficial effects have been, not through the enforcement of its compulsory features, but by reason of the official promotion of co-operation between employers in raising the standard of wages.

#### VOLUNTARY AID BY EMPLOYERS.

In connection with the subject of minimum wage by voluntary co-operation, and as preliminary to a discussion directly addressed to the legislative minimum wage, let us consider the present attitude of employers, and particularly those who would be first affected in Minnesota, with reference to benefits, by means of increased wages and in other ways, to their employes.

The first proceeding of the Minnesota Commission to establish a minimum wage was taken with reference to the employes in the mercantile houses, particularly the department stores, of the two cities, Minneapolis and St. Paul. The nature of the retail mercantile business requires classes of labor varying most widely in the demands for ability. Organization of such a business necessitates the employment on the one hand of high-salaried experts from the managing head to the sub-managers and overseers, and on the other hand of a class of help of whom little or no experience or preparation is required, together with all the intermediate classes. On account of the low standard of proficiency required in the primary departments, the positions are sought by minors, particularly young girls, who, forsaking the advantages of the public free school system, seek to become

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<sup>18</sup> See Report Massachusetts Commission on Minimum Wage Boards, January, 1912, pages 14-15; "The Principle of the Minimum Wage," by A. C. Pijou, *Nineteenth Century*, March, 1913; "Minimum Wage and Its Consequences," by Sidney Brooks, *The Living Age*, May 11, 1912; "The Economic Theory of a Legal Minimum Wage," by Sidney Webb, *the Journal of Political Economy*, December, 1912; "Massachusetts and the Minimum Wage," by H. LaRue Brown, *Chairman of Massachusetts Minimum Wage Commission, Annals Academy Political and Social Science*, July, 1913, page 13, 16, 17.

in some measure an asset instead of a charge upon their parents at home. Some of them would be unable to earn or to receive a minimum wage based even upon a mere living wage. At the lower wage, however, they are able to help sustain themselves and at the same time, by actual training, to add to their efficiency and their ability later to earn and to receive higher wages. Among the regular and more experienced employes, generally women, who attend to the retail sales, opportunities for advancement in position and in wages are always open. The more attentive and serious advance, while the positions of the careless and indifferent ones remain at a standstill unless they are compelled to drop out altogether. Primarily it is the law of supply and demand which governs not only the obtaining, but also the retention of their positions, including the wages which they receive. Under the present system it generally depends upon the girl herself whether she advances in proficiency and in wage-earning capacity. In most instances her efforts for advancement are promoted and encouraged by the assistance of her employer, who recognizes the fact that it is for his interest to raise in his establishment the standard of efficiency, to promote the health, happiness and well-being of his employes, and to raise them as fast as possible, not only to the standard of a minimum living wage, but as much further as possible.

It is not true as to the mercantile establishments of Minnesota, and particularly of the Twin Cities, that there is generally any inconsiderate or illiberal treatment of the lower-paid classes of employes. None of the retail merchants of the Twin Cities are opposed to a minimum wage as such. Neither are they opposed to any workable, practicable method, whether compulsory or otherwise, for raising the standard of wages, even by a legislative minimum wage, if only they may be assured that it will work out as a practical benefit to their employes and at the same time not create insurmountable obstacles to the continuance of their business enterprises. They stand without exception for the promotion of the health, happiness, morals, comfortable living and general prosperity of their employes. When, however, they are asked to submit to a proposed recommendation of a statutory wage commission that they, or certain

of them in this particular locality, shall pay to each and all their employes without exception not less than an arbitrarily fixed sum, they naturally inquire, whether, under the workings of the statute in question, they are to be singled out as against competitors in the same line of business, or are to be affected in equal degree so that artificial barriers will not be created against their otherwise free competition. In other words, they join in the very reasonable inquiry: Is the statute, to which they are asked to submit, a workable or enforceable law?

The answers to such inquiries will be suggested later in this discussion; but right here let me emphasize the fact of the good faith of such employers in hesitating to co-operate at once in the absence of satisfactory answers to such inquiries. The retail merchants of no locality have done more to demonstrate a spirit of co-operation in the welfare of their employes than have the merchants of the Twin Cities. It is not uncommon that in a department store a well-organized school of instruction is maintained, not only free of expense to the employe, but with the privilege of attendance upon time paid by the employer. To these, in many instances, is added the feature of special lectures by experts in the different branches of the business. Then there are sanitary and well-fitted rest rooms where the girls may obtain temporary refuge and rest from the exactions and turmoil of their daily work. This is only a part of the benefit from well-organized welfare departments operated under competent supervision and through which close personal contact is maintained with the employe, not only in connection with her work, but outside, and even extending to her domestic life.

A common source of help is the maintenance by the employer of a mutual benefit plan, by which the employe receives aid in times of sickness; death benefits are also included. Beside contributions by the employes, the employer often adds to the benefits by voluntary contributions. The higher class of help who are more able to take advantage of such opportunities are, by many employers, allowed to purchase an interest in the business, paying on time. Encouragement to thrift is also given to the lower paid employes through deposit departments, where savings deposited draw the full legal rate of interest.

In some instances the employer has further encouraged savings by starting an employe's savings accounts out of his own funds. One Minneapolis mercantile house has established in the heart of the city a lodging house, where otherwise homeless girls may have for extended periods of time a home with all reasonable comforts and at only a nominal expense—indeed, at an expense much less than the actual cost to the employer. No single enterprise could be more conducive to the preservation of the morals, health and comfort of the girl wage-earners who have not at hand the ordinary home comforts. The same employer recognizes the salutary effects of wholesome vacation periods which to the low-wage earner are only inadequately available; and he plans to construct a little colony of cottages upon the lake shore in the country for the exclusive use of employes upon their summer vacations. These opportunities will be afforded for less than cost and at a price within the reach of the lowest wage earner.

A comparison of the wage-cost percentage of sales in the business of mercantile houses throughout the country shows that such percentage is one-quarter greater in Minneapolis and St. Paul than in any other cities of their size. This is a further proof of the already existing co-operative interest on the part of the employers in mercantile houses in the Twin Cities in behalf of their employes.

In the light of the foregoing, let us now examine the minimum wage as a subject not merely of ethics or of economic law, but of legislative enactment.

### THE LEGISLATIVE MINIMUM WAGE.

As we have already seen, the tendency is that any evil effects through the establishment of a minimum wage, due to the consequent strain or violation of natural economic laws, are experienced to the degree that such strain is enforced and made inelastic by compulsion. Voluntary or co-operative establishment and maintenance of a minimum wage leave opportunity and means for necessary adjustments and readjustments by which the evil results, otherwise following from defiance of natural law, may be remedied in whole or in part.

Two classes of inquiry confront the legislator who has to determine the policy of a minimum wage statute. His first inquiry is as to the general expediency of such a law; and such inquiry involves not only the ethical questions, but particularly the questions of economic law. Outside of the question of constitutionality: Is the statute as framed workable? Is it expedient? Will it work out in practical results beneficial to the greatest number? Will it be ultimately to the advantage of the particular employe class for whose benefit it is proposed? If so, will such benefits be counter-balanced by greater harm to the employer class or to other classes, either the employes or the general public? Next, as in the case of all statutes contemplating the restriction of the liberty of contract, or compelling one citizen or one class of citizens to sacrifice something of their property or earnings for the benefit of another class, or interfering with the natural laws of competition, the question presented to a legislator is: Whether the police power of the State gives to its legislature under the existing circumstances the right to enact and have enforced a statute which in its practical workings must have, to some degree at least, the disadvantageous results suggested?

The experience with legislative minimum wage has been so slight that, as stated by Mr. Aves, the British expert who made investigations in Australia, it can as yet be considered no more than as mere experiment. It is, therefore, manifestly unwise to fly in the face of experience, or rather in the face of inexperience, to the adoption of a measure drastic and far-reaching in its effects. Moreover, if the minimum wage is to be the subject of legislative enactment, the particular methods of legislative supervision in the proposed statute should be carefully scrutinized in order that any proposed method of the application of the legislative minimum wage may not be objectionable as against another which might be acceptable.

#### MINIMUM WAGE LEGISLATION IN THE UNITED STATES.

So it is that we find that in the United States the methods contemplated by the different statutes vary from the voluntary legislative minimum wage in Massachusetts to the arbitrary statutory wage established without investigation by the legisla-

ture of Utah. The people of Massachusetts, through their legislature, approached this question in a judicial attitude, but with the utmost caution. Their conservatism did not spring from the prejudice of the propertied interests, but rather from the consciousness of an enlightened citizenship which recognized, after deliberate consideration and study, the difficulties presented by reason of the inevitable effects of natural economic law. They chose the method in the application of which the obstacles presented by the natural laws of business and of competition would be the most minimized. This, too, was only after a state commission under the legislative resolution of 1911 had spent a year in careful investigation followed by a full report of its findings and recommendations.<sup>19</sup> Following this report, the Massachusetts legislature of 1912 adopted a non-compulsory act which provided for investigation and recommendation by a Commission of a minimum wage for women and minors, and with power to publish their recommendations and the names of employers not submitting thereto. But even such power of publication could not exist until after full hearing and adjudication upon notice to the employer and with privilege to the employer to appeal to the courts to have adjudicated the question as to whether the minimum wage rate imposed upon him was, under all the circumstances, fair and reasonable.<sup>20</sup> That act recognized the fact that the principal efficacy of legislation is the promotion of co-operation in the effort to raise wages, and that a drastic compulsory act would result, not only in consternation among employers, but also in discrimination and even in disaster to business, at the same time that it prevented the necessary readjustments which only co-operation would be adequate to bring about.

The Nebraska statute of 1913 follows substantially that of Massachusetts.<sup>21</sup> Compulsory acts with penalties for refusal to comply with the order of the State Commission fixing the minimum wage, were passed by the legislatures of 1913 in Oregon, Washington, Colorado, Wisconsin and Minnesota. Also in California, together with a proposal for the adoption of a con-

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<sup>19</sup> Report 1912 Massachusetts Commission on Minimum Wage Boards.

<sup>20</sup> See Massachusetts Statute, Appendix III.

<sup>21</sup> See Appendix III.



stitutional amendment authorizing a compulsory legislative minimum wage. In Ohio in 1912 there was adopted a constitutional amendment authorizing laws establishing a minimum wage. In Utah the Wage Commission feature of other state statutes is entirely eliminated, and the 1913 legislature passed a statute making it unlawful to employ females at less than a specified rate for minors, another specified rate for adult learners and apprentices, and another specified rate for experienced adults. There is no distinction between different classes of employments, and a breach of the law by any regular employer is made a misdemeanor.

These acts are generally made applicable to women and minor employes, and the basis for computing the minimum wage for any employe or class of employes in any occupation is that it shall be adequate to furnish them a living with reasonable comforts. Most statutes are made ostensibly under an assumed police power of the state to protect, through the minimum wage, the health and morals of the employes affected. They generally provide for a hearing upon notice to the employer before the final order of the Commission is promulgated fixing the minimum wage applicable to such employer, and with the right of appeal to the courts in case such final order shall be unsatisfactory. The absence from the Minnesota statute of that usual protection to the employer is, as will be shown later, one of the peculiarities which make that statute particularly open to objection.

A summary of the minimum wage statutes adopted in the United States up to the present time is given in the Appendix.<sup>22</sup> The Minnesota statute of 1913 is shown in full.<sup>23</sup>

#### MINIMUM WAGE STATUTES IN OTHER COUNTRIES.

The legislative wage is not a new idea. It appeared first in the form of a maximum agricultural wage at several periods in the early history of England. These maximum wage statutes were the outcrop of the oppression of the lower classes, and particularly laborers, and in favor of the landed interests, which was indulged in from time to time by Parliaments not sufficiently representative of the common people. They were

<sup>22</sup> See Appendix III.

<sup>23</sup> See Appendix I.



of the same unscientific class as statutes regulating the prices of land, of flour, of fuel, and of other necessities of life. These odious statutes of labor, in the time of Henry VI and Edward III prohibited the laboring man from seeking employment outside of his own country, compelled him to work for the first employer demanding his service, and punished him for any violation. Referring to these statutes, as well as to the modern minimum wage statutes, the Supreme Court of Indiana recently said:<sup>24</sup>

“In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions.”

From the beginning of the nineteenth century, English labor statutes have been framed for the protection of the laborer. These include the factory acts promoting safe and sanitary conditions for labor, limiting the hours for dangerous or unhealthy occupations, and the acts for workmen's compensation in case of casualty, and other measures, many of which in form or in spirit have become or are becoming statutory measures in this country.

The statutory minimum wage, however, is a modern idea. It first appeared in Belgium in 1887 in the form of a minimum wage statute for laborers employed in public work. This, as we shall see, is far different, upon both economic and constitutional grounds, from legislating a minimum wage for private employment. In jurisdictions with constitutions, limited or unlimited, the power of the State has always been recognized, to legislate as to the terms of labor contracts in which the State itself or any of its municipal subdivisions, arms of the State, should be a party.

The first legislative minimum wage applying to private employment was adopted in Victoria in 1896 and was soon followed by similar statutes in other Australian provinces and in New Zealand, and has been in force in England since January,

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<sup>24</sup> *Street vs. Varney Electrical Co.*, 160 Ind. 338.

1910.<sup>25</sup> These Australian and English acts applied to both male and female employes. It should be kept in mind that there is no constitutional limitation of the power of Parliament in such matters. When Parliament has determined the question of the expediency of a policy, its expression in statutory form becomes both the statute and the constitution. The English Parliament had the benefit of the experience of New Zealand and the Australian provinces, and also of the special investigation and report by the British expert Aves upon the results, theoretical and practical, of such legislation in Australasia. As already shown, his report was that the real practical benefit of these statutes was to promote voluntary co-operation on the part of the employer;<sup>26</sup> and that the conclusion was not then (in 1909) justified that the recommendations of any special wage board should be made legally binding in a country like England, or that such power, if granted, could be effectively exercised. He deemed these attempts in the Australian provinces and in New Zealand as yet mere experiments, even in those countries, and that their apparent success was due to the prevalence of good times since their adoption, and to the fact that they applied to a small, centralized government, and were limited to only a very small number of workers, and thereby presented much less and entirely different difficulties of application from those which would be confronted in a country like England or the United States.<sup>27</sup> England, therefore, proceeded cautiously, and the act of 1909 was applicable to only four trades in which much sweating existed, and it was also extended to all workers underground. The English statutes must still be considered experimental. They are being applied by thoroughly organized wage boards, but dissatisfaction is expressed, not so much as to the rate of wages established, as to the system of the minimum wage, and not only by employers, but by employes.

The adoption of a minimum wage in this country, beginning with the Massachusetts act of 1912, was borrowed, as was other

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<sup>25</sup> The Trade Boards Act, 9 Edw. 7, Chap. 22, adopted Oct. 20, 1909; Report Massachusetts Commission on Minimum Wage Boards, 1912, page 14-161; *Annals of Academy Political and Social Science*, July, 1913, "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, pages 45-46, and "The Minimum Wage in Great Britain and Australia," by Prof. Hammond, pages 25-26.

<sup>26</sup> Report Massachusetts Commission on Minimum Wage Boards, June, 1912, page 14.

<sup>27</sup> "The Legal Minimum Wage," by James Boyle, *Forum*, May, 1913.

labor legislation from England. It is obvious that the fact of the adoption of such legislation by England, and even of its practicability and enforcibility in that country, would not be conclusive of its practicability or enforcibility in this country. Its attempted application here is confined by the statutes to females and minors, in order to make its proposed beneficiaries within a class sufficiently distinctive for the basis of some argument in favor of justification for such legislation under the police power of the State. This is on the theory that women and minors are generally, as a class, weak in bargaining power, and peculiarly entitled to the protection of their health and morals through paternalistic legislation which could not be enforced here as to male adult workers.<sup>28</sup>

### THE MINNESOTA STATUTE OF 1913.

We now come to the Minnesota statute of 1913<sup>29</sup>. In the light of what has been said a mere reading of that statute, which is printed in the Appendix in full, would disclose to any reader that there are serious questions presented in regard both to its practicability and its enforcibility. It was not, then, surprising that the first Advisory Board which was called to consider the question of a minimum wage as applied to mercantile occupations in the Twin Cities, should have found it impossible to proceed without first having satisfactorily answered certain questions suggested from the very terms of the statute. These questions and a resolution asking for their answer are printed in full as a part of the Appendix.<sup>30</sup> These questions, with the exception of the last, go primarily to the practicability or workability of the statute, even if it shall be considered constitutionally enforcible. The final question is as to its enforcibility, and, therefore, involves a discussion of its constitutionality. Let us take up these two classes of questions in their order:

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<sup>28</sup> Annals American Academy Political and Social Science, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Samuel M. Lindsay, Professor of Social Legislation, Columbia University; also, "The Minimum Wage in Great Britain and Australia," by Matthew B. Hammond, Professor of Economics and Sociology, Ohio State University.

<sup>29</sup> See Appendix I.

<sup>30</sup> See Appendix II.

## PRACTICAL QUESTIONS SUGGESTED UNDER THE MINNESOTA STATUTE.

Among the many questions propounded, together with others suggested, are the following:

1. Can the Commission fix a minimum wage for any occupation in one district of the state, without reference to that occupation in the state as a whole?

Section 2 empowers the Commission on its own motion, to, or, on request of one hundred persons in any occupation, it must, proceed to investigate the question of wages paid to women and minors in such occupation in the state. It is only "after" such investigation,—that is, state-wide,—that it may determine the minimum wage for such occupation "throughout the state," or within any area of the state if differences in the cost of living warrant this restriction (Sections 5 and 6). As to any occupation, it may establish an Advisory Board whose recommendation, which may be approved by the Commission, is confined to minimum wages in the occupation in question as provided in Section 6 (Section 9). But Section 6 requires the investigation to be state-wide.

Now, these powers, delegated by the legislature, cannot extend further than the terms expressed in the provisions by which the delegated power is given. Moreover, it is manifestly partial and discriminatory between employers in the same occupation to attempt to apply the compulsions of the statute to one city, or to any particular part of the state, without applying it to the entire state for that occupation. This is true, whether the rate of wage is uniform, or varied in different localities.

2. The preliminary investigation, which is a pre-requisite to the power of the Commission to act, must show that one-sixth of the women and minor employes in any one occupation in the entire state receive less than living wages.

This is the provision of Section 5, and the "opinion" required of the Commission that one-sixth receive less than a living wage, must, under well-known rules, be not the arbitrary guesswork of the Commission, but a conclusion founded upon the state-wide investigation expressly required.

Moreover, the preliminary investigation must be, as to each

of the classes, "women" and "minors"; and the requisite basis must be established for women before a minimum wage can be established for women. So, as to minors.

3. Can a separate minimum wage be established for women and another for minors; and can there be a different wage for male minors from that fixed for female minors?

The only basis upon which the Commission is empowered to fix a minimum wage for any employe or class of employes, is that it shall be a "living wage" and such living wage is defined as the wage "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life." The term "woman" is defined as a female 18 years of age or over; and the term "minor" as a male under 21 years of age or a female under 18 years (Section 20). Now, it is apparent that the minimum wage cannot be fixed as to each individual according to what is for him or her a "living wage," as defined. The basis of computing the rate, applicable to any class or classes of employes, is expressly limited to "a living wage" as defined. By limiting it to "a living wage" consistent with "reasonable life," the act, by its terms, views each employe and each member of any class of employes, and indeed employes of all classes, merely as human beings having life in which they are to be supplied with health and the necessary comforts. No distinction is attempted, and it is manifest that none can be made, for the different standards of living. The standard which is to be the basis is fixed by the express terms of the statute and that statutory standard applies equally to all employes whose minimum wage is to be fixed. Therefore, there can be no different standard recognized as a basis for fixing the minimum wage for a woman minor from that fixed for a male minor. Neither can there be any difference recognized between the minor, whether male or female, of 17 years of age and the minor who is only, say, 12 years of age. The standard fixed is applied to the employe as a person, independent of his other means of sustenance or support. Again, no different standard of measurement could be applied to the female minor of 17 years or to the male minor of 20 years, than is applied to the "woman," not minor, of 18 years, or of 22 years, or more.

Consequently, the minimum wage to be fixed as to any occu-

pation in any one locality cannot vary as between minors, male and female, and adult women; neither can it vary between male and female minors.

4. The statute does not allow for any distinctions between experienced workers or workers of ordinary ability and those who are merely learners or apprentices.

In terms the statute requires an advisory board, with reference to any occupation in question, to recommend a minimum wage sufficient (1) "for women and minors of ordinary ability;" and (2) "for learners and apprentices" (Section 8). It is provided that the terms "learner" and "apprentice" mean either a "woman" or a "minor" and that the term "worker" or "employee" means either a woman, a minor, a learner or an apprentice (Section 20). But, as already shown, there is no provision for any adjustment or variation as between any of these last named four classes.

The basis of computing the minimum wage is confined to making it a "living wage" for the employees to which it is applicable. The statutory definition of "living wage" is the same for each and every employee and for each and every class of employees. A learner or apprentice may be either a woman adult or a woman minor; or either a male minor under 21 years or a female minor under 18 years. The statute can affect none except women or minors, so that adult male learners or apprentices are excluded from even the terms of the act.

Manifestly, then, there is no power to compute a minimum wage for learners or apprentices at a different rate from that for any and all other classes of employees affected; because the minimum wage itself and its basis of computation are fixed up to the full living wage as applied to the employee as a person, without distinction by reason of the time of his employment, the amount of his efficiency, or the fact whether he is classed as one kind of an employee or another.

5. The reasons already shown answer the other inquiries under paragraph 4 of the questions propounded by the Advisory Board.

The same minimum wage must be fixed for all classes of employees to which it is applied in any occupation in any locality. By the terms of the statute, there is prohibited the possibility



of any consideration being given to the fact that the standard of living of one employe is higher than another, or that the standard of one class of employes is higher than another. Moreover, the standard of computation is so fixed by the statute that no consideration can be given to the ability of the employer to pay. Again, no variation can be made on the ground that any employe or class of employes has to contribute to the support of others dependent upon him; nor that the employes themselves may be receiving the benefit or aid of contribution from their relatives or others. This alone shows the insufficiency of the statute, its impracticability as a working measure, and its unreasonable provisions, resulting in discrimination, not only between the employes themselves, but also between the employes and employers and also between different employers in the same occupation.

The inelastic basis fixed by the statute for the computation of the minimum wage prohibits also any consideration to be taken of the advantages, educational or otherwise, which the employe receives from any particular employment, whether such employe be a learner of the occupation in which he is engaged, or otherwise. These considerations, in practice, have always influenced, and very properly so, the amount of wage which is reasonable for the employe, and which the employer is willing and able to pay. But these reasonable considerations in fixing the wage are precluded by the terms of the statute. No matter that an employe and an employer should afterward agree upon a reasonable wage, computed in view of these and other reasonable considerations, nevertheless, if it happens to be, even for a short time, less than the fixed statutory minimum wage for such employe, the latter may repudiate his contract, retaining all the advantage, and sue his employer for the difference (Section 14), and such employer also may be fined and imprisoned (Section 19).

In view of the foregoing, it is manifest that when the minimum wage is fixed for women and minors in any particular occupation, one of two things must occur. The necessary uniform wage, impossible of variation to suit the different classes of employes and the different circumstances of their employment, must either (1) be made on the basis of the standard of the low-



est of the members of the class of employes affected; or (2) it must be placed at a rate above the lowest standard and perhaps up to the highest standard of any employes affected. In either case, such minimum rate cannot be satisfactory to all employes affected. In case the former method is adopted, the minimum fixed will tend to become the minimum for all lower class employes. In both cases, all employes of an efficiency less than that measured by the wage-rate fixed will go out of employment, the number thus forced out increasing as the minimum rate is raised; so that in the latter case, of a minimum rate computed by the highest standard, the greatest number of employes are forced out and deprived of the advantages of learning a trade or business and of receiving some wages which will at least assist in their sustenance during their apprentice period.

Accordingly, without touching the question of constitutionality, having in mind the general objections to a statutory minimum wage based upon practical economic questions, already presented, it is obvious that the Minnesota statute of 1913 is exceptionally narrow in its scope and terms, and is impracticable both from an economic viewpoint and business viewpoint and from the viewpoint of an employe as well as an employer; and that, with its present terms and provisions, it is unworkable. It is so defective that it could not serve the purpose,—which heretofore has been found to be the main, if not the only real, practical, salutary effects of such statutes,—of promoting co-operation between employers and the State Wage Commission in the cause of better pay for wage earners.

Such co-operation would be further discouraged and prevented if the statute should be finally determined by the courts to be unenforcible against any employer or class of employers to whom it is attempted to be applied. In such event, also, the entire work of the Commission theretofore done would be futile, and the general cause represented by the advocacy of a minimum wage would be discredited; to say nothing of the great expense of time and trouble which would have been wasted. Many employers, particularly in the retail mercantile business, are, as we have seen, ready to co-operate to any reasonable degree with any proposition or measure for the betterment of their employes, and would gladly join in the establishment of

a minimum wage at a fair and reasonable rate, if they could be assured that ultimately their acquiescence and co-operation with the work of the Commission could really be expected, under the statute in question, to bring about the results proposed. It is reasonable that they should desire to be assured that by their unqualified acquiescence in the orders promulgated by the Commission, they would not thereby make themselves the subjects of unfair and unreasonable discrimination in favor of competitors. It is reasonable to demand an answer to the question: If certain employers acquiesce and co-operate, and thereby bind themselves to the orders finally promulgated by the Board, then will other competing employers in the same occupation be compelled to adopt the same minimum wage? Otherwise, voluntary acquiescence means not only no benefit in the end to the employes in question, but it means loss and perhaps disaster on the part of the employers acquiescing. It means at the same time that the recalcitrant employers reap not only temporary but permanent selfish advantage and profit.

The question of constitutionality is therefore a proper one, and a vital one, and its careful consideration is of the utmost importance in the interests of the employes, in the interests of employers, and in the interests of the members of the State Commission and its Advisory Board, including all the forces which are working to the establishment in this state of a minimum wage for women and minors.

Next, therefore, I take up the final question recently propounded by the Advisory Board: Is the Minnesota statute enforceable?

### THE MINNESOTA STATUTE IS UNCONSTITUTIONAL.

The theory upon which the Minnesota statute is based, as a constitutional question, is shown by the following propositions which will be urged by those arguing in its support:

(1) While the statute has the effect to limit the right of contract in private employment, also to compel an employer, so long as he retains certain employes on his pay roll, to pay them in excess of what they earn and thereby compels the employer to contribute to the sustenance of the employe without

regard to consideration, and although it has the effect to discriminate between the employer affected and other employers within or without the state who are in the same class,—yet neither for this or for other reasons is the statute necessarily repugnant to the constitutional prohibition against statutes having such effects, because it is a statute the prime object and effect of which are to protect and safeguard the general public welfare, in that it promotes the general health and morals of its citizens and particularly of that class of citizens to whom it applies, and therefore it is justified as a proper exercise of the police power of the State.

(2) That the statute has the same basis of constitutionality as statutes which have been sustained, regulating certain rules between employer and employe, including those compelling healthful and safe conditions and instrumentalities for work; those restricting hours of labor and even a minimum wage for employes engaged in public employment or in public work; those limiting the hours in private employment in occupations in their nature peculiarly and necessarily unhealthful or hazardous; and also those providing employment restrictions peculiarly necessary, in the instances in which the statutes are applicable, to the protection of women or minors, as such, and as distinguished from the less stringent restrictions assumed to be necessary for the protection of men adult employes.

(3) For the reason that the police power has been sustained as the basis for certain statutory regulations, applicable to certain cases of employment in favor of women, as such, and in favor of minors, as such, which presumably, under the decisions, could not be applied to adult male employes; therefore, any statute regulative of employment of women, or of women and minors, if only its purpose be made ostensibly to appear as one to preserve or promote the morals and health of the intended beneficiaries of the act, must be sustained as within the police power of the state.

(4) The Minnesota minimum wage statute, applying to women and minor employes, *engaged in any occupation*, is just such a statute as is described in the last premise. It is, therefore, within the police power, no matter that it restricts the liberty of contract, takes the property of one for the benefit of another, and has many effects which, otherwise than for the paramount nature of the police power, would make it repugnant to the well known constitutional limitations prohibiting statutes depriving citizens of their liberty or property without due

process of law, discriminating between citizens of the same class, unduly delegating legislative power, and other limitations safeguarding well recognized individual personal and property rights.

Any argument in favor of the constitutionality of this statute, however expressed, will, when analyzed, resolve itself into an attempt to support the propositions of law as above expressed. It requires only a cursory examination of the authorities to disclose the fallacy of that argument.

There has been no decision of any appellate court, federal or state, sustaining a statutory compulsory minimum wage for either men or women or minors in any private employment. No inferior court, federal or state, has sustained such a measure, with the exception of the recent decision of Judge T. J. Cleeton of the Circuit Court of Multnomah County, Oregon, in the case of *Frank C. Stettler*, plaintiff, vs. *Edwin V. O'Hara, et al., members of the Industrial Welfare Commission of the State of Oregon*, defendants. This case was brought to test the constitutionality of the Oregon minimum wage statute, which, as herein shown, by reason of its provisions for hearing and notice and other provisions, is less open to the charge of unconstitutionality than is the Minnesota statute.

Judge Cleeton, in his decision, takes the position that, as the question involved was undetermined by any decision of the highest courts covering the precise question, he would, for the time, solve all doubts in favor of the constitutionality of the statute, in order that on appeal to the higher courts the question might be there determined. The case is now pending in the Supreme Court of Oregon.

In order further to direct attention to the precise questions here involved, and to show the fact that the very distinctions made in the decisions of the highest courts in cases of other statutory regulations in labor matters point very clearly to the conclusions herein reached, I will next show that certain decisions and classes of decisions which are cited in support of a statutory minimum wage for employes in private employment, not only do not support such a minimum wage, but are conclusive against it.

Such decisions are those (1) upholding statutory hours or

wages for employes engaged *in public work*; and (2) next, decisions upholding statutory hours for employes engaged in *exceptionally unhealthy or hazardous occupations*, and then (3) decisions extending the police power of statutory protection to women beyond the limits established for men, and showing the grounds of the distinction in favor of women and *the limits within which such distinction is permissible*. Such examination will show that the statutory limits of regulation of employment of women under the police power are so established as to prohibit the statutory minimum wage for women and minors as provided by the Minnesota act of 1913.

In other words, it will be shown that the decisions cited in support of this minimum wage not only do not support it, but on the contrary are against it. To this showing will be added decisions directly adjudicating that such statutory minimum wage for private employment is unconstitutional.

#### DECISIONS AS TO EMPLOYES ENGAGED IN PUBLIC WORK.

A Kansas statute regulating the employment of all laborers, in any public work, to an eight hour day, was upheld by the United States Supreme Court, without reference to the question of police power, on the ground that the State had the power to prescribe the conditions upon which it, the State, or any of its municipal divisions, which are a part of the State, should enter into contracts for labor. As said by Justice Harlan, who wrote the decision:

“Whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work *for it or for one of its municipal agencies*, should permit or require an employe on such work to labor in excess of eight hours each day, and inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may chose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit *public work*

to be done on its behalf, or on behalf of its municipalities.”<sup>31</sup>

The Court, in the same decision, expressly holds (page 218) that the question of police power, touching the regulation of hours in private employment in hazardous occupations, such as was discussed in the case of *Holden v. Hardy*, 169 U. S. 366, was not involved for the reason, as shown by the quotation just given, that the work was public work.

What is more significant, the Court says:

“No question arises here as to the power of a State, consistently with the federal constitution, to make it a criminal offense for an employer in *purely private work* in which the public has no concern, to permit or to require his employes to perform daily labor in excess of a prescribed number of hours.”

Then distinguishing the case of *Holden v. Hardy*, in which the limitation of hours for laborers in underground mines and smelters to eight hours, was supported on the ground of the exceptional hazards of the employment, the Court said:

“As already stated, no such question is presented by the present record; for, the work to which the complaint refers is that performed on behalf of a municipal corporation, *not private work for private parties*. Whether a similar statute, applied to laborers or employes in purely private work would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider.”<sup>32</sup>

This decision established the principle that statutory regulation of hours, or even of wages or any other condition, as applied to contracts or employment *for public work*, does not present the question of police power; that such a statute is within the power of the State, on the ground of public policy, which leaves to the State the power to control the conditions of contracts to which it or its municipal subdivisions shall be a party for the purpose of its own public work.

This authority is recognized in the recent Washington decision where a state statute not only regulated hours, but fixed

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<sup>31</sup> *Atkin vs. Kansas*, 191 U. S., 207, 222.

<sup>32</sup> *Atkin vs. Kansas*, 191 U. S., 207, 218-219.



a minimum wage for employers engaged in public work. It was upheld by the Supreme Court of Washington on a second hearing, on authority of the reasoning and conclusion in the case of *Atkin v. Kansas*.<sup>83</sup>

Cases, therefore, decided on the ground that the work involved is *public work*, not only do not apply, but they clearly make a distinction as against cases of private employment and indicate that any general statute regulating hours or wages in private employment must, as to the classes of labor to which they apply, be based upon distinctions clearly sufficient to bring them within the police power of the state.

This leads to the distinctions made with reference to private employment.

#### DECISIONS AS TO EMPLOYES IN EXCEPTIONALLY UNHEALTHFUL OR HAZARDOUS OCCUPATIONS.

It has never been held that, as to men or as to women, statutory restrictions of hours or wages could be enforced, except as to employment in such exceptionally unhealthy or hazardous occupations, that the peculiar hazard to health, life or limb of those occupations justified the statute as a police power regulation of the health or safety of the employes embraced in the act.

On this principle it has been decided in many cases, which holding has been supported by the United States Supreme Court, that hours of labor might be limited in private employment in underground mines, smelters, etc. A statute of Utah made such limitation at eight hours and in upholding that statute as a proper exercise of the police power, the United States Supreme Court said:

"The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. *These employments*, when too long pursued, the Legislature has judged *to be detrimental* to the health of employes, *and so long as there are reasonable grounds for believing that this is so*, its decision upon this subject cannot be reviewed by the federal courts. While

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<sup>83</sup> *Malette vs. City of Spokane, Washington*, decided Dec: 31, 1913.



the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the process of refining or smelting.”<sup>34</sup>

By this decision, there was expressly excluded the power, though ostensibly based on the police power of the State to protect health and morals, to enact any regulation of private employment and have it applied to any particular occupation, unless *from the peculiar nature of that occupation itself*, there could be reasonably said to be presented some peculiar hazard to the health or welfare of the employes in question. That question of fact must be determined by a consideration, first, of the nature of the occupation in question; and, second, the nature of the condition of the employes in question, as connected with the particular occupation in question. Neither of these elements alone is sufficiently determinant. The police power cannot be exercised solely because the class of employes in question is composed of men or of women or of minors, either or all. Neither can it be exercised solely because the occupation in question is of one kind or another, either hazardous or non-hazardous.

*The exercise of the police power in such cases is to be determined by the nature and extent of the peculiar hazards to health or safety arising out of the connection between the particular class of employes in question with the particular occupation in question.*

*If, from such connection, standing by itself and independent of other causes or conditions, there does not arise peculiar conditions menacing the health, comfort and safety of the employes, then there is no ground for the exercise of the police power in connection with such occupation.*

Without going further, then, it is manifest that even if it be established that a certain employer in a certain

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<sup>34</sup> Holden vs. Hardy, 169 U. S., 366.

occupation does not pay a certain employe or a certain class of employes a living wage, by reason of which fact the health, comfort or even morals of the employe is menaced, nevertheless the requisite ground for the interference of the State through its police power is not present. The needs of the employe are absolutely independent of anything that is related to the occupation in question. They are neither created nor increased by reason of any action on the part of the employer or through anything which is peculiar to the particular occupation in question. This is as far as we would need to go. For the fact remains that neither the lack nor the need of a living wage is peculiar to any particular class of persons, nor to any particular class of employes, whether the class distinction be made on the basis of age, of sex, or of experience. That necessity is individual. It is neither created nor increased by the fact that the individual suffering from that common need, that natural need, happens to engage himself in a particular occupation as an employe.

There is no ground for the distinction attempted in this minimum wage statute, though confined to women and minors, which warrants its support as a police power measure in furtherance of health and morals.

I am stating these fundamental propositions now because they are suggested by the decisions already cited, and they will be illustrated and confirmed by the decisions which I shall next cite.

#### THE NEW YORK BAKERY SHOP CASE.

The Legislature of New York passed a statute limiting the hours of employment in bakeries to ten hours a day. This applied to employes of both sexes. The United States Supreme Court held that act void as not within the police powers of the State, and the Court said:<sup>35</sup>

*"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded*

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<sup>35</sup> *Lochner vs. New York*, 198 U. S., 45, 56.

power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

“This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? And that question must be answered by the court.

“The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interests of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation

of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours per week. The limitation of the hours of labor does not come within the police power on that ground.

"It is a question of which of two powers or rights shall prevail,—the power of the state to legislate, or the right of the individual to liberty of person and freedom of contract.

*"The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid, which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.*

"This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the court dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the state, the Court of Appeals has upheld the act as one relating to the public health,—in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

"We think the limit of the police power has been reached and passed in this case. *There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employee, to*

make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, *there would seem to be no length to which legislation of this nature might not go*. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden vs. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383, and *Jacobson v. Massachusetts*, 197 U. S. ante, 643, 25 Sup. Ct. Rep. 358.

"We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness.

"But are we all, on that account, at the mercy of legislative majorities? A printer, tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. *No trade, no occupation, no mode of earning one's living could escape this all-pervading power*, and the acts of the legislature in limiting the hours of labor in all employments would be valid, *although such limitation might seriously cripple the ability of the laborer to support himself and his family*. In our large cities there are many buildings into which the

sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is, therefore, unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts."

This decision has been vigorously attacked, and it is even asserted that the dissenting opinion in this case "is the law in this country today."<sup>36</sup> But the dissenting opinion in that case did not support or urge any principle which could be the foundation for a statutory minimum wage in private employment. It was based upon the proposition that, as the Legislature of New York had declared, that the *bakery industry was peculiarly dangerous to the health of employes*, the contrary fact was not so well established and well known that an appellate court could say of its own motion that the finding of the Legislature was wrong upon this question of fact, nor that the state appellate court was wrong in refusing to reverse the state legislature as to that finding of fact.<sup>37</sup> But note that in this decision there is emphasized the principle which I have above stated as controlling the consideration of the constitutionality of this minimum wage statute, and my present contention is supported even more by the dissenting opinion than by the main opinion. Taken together, they form a complete

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<sup>36</sup> Report Massachusetts Commission on Minimum Wage Boards 1912, page 24.  
<sup>37</sup> *Lochner vs. New York*, 198 U. S., 45; Dissenting Opinion, 65-74.



confirmation of my proposition, and a complete answer to the claim of constitutionality for this minimum wage statute. They clearly establish the rule that in these matters the hazard to safety, health or comfort of the employe which may be protected by the statutory regulation must be a hazard peculiar to the occupation in question.

A statutory restriction, even as to hours of labor, which had no relation between the occupation affected and the question of the safety, health or morals of the employe, could have no validity based upon the police power of the state. Yet this minimum wage statute applies to any occupation and to each and all occupations, businesses and industries, and to every branch thereof, without any reference or consideration to any peculiarity of any such occupation, much less of any peculiarity with reference to it being hazardous to safety, health or morals. Accordingly, a regulation of hours made in the broad terms of this statute could not be justified; much less a regulation of wages, computed by the living needs of the employe, which are not even remotely connected with, but are absolutely divorced from, anything arising out of the occupation itself.

There is no "real or substantial relation" between the employments affected by such a statute and the objects which it purports to accomplish. In other words, there is no real or substantial relation between the occupation of, for instance, the retail merchant and the natural necessity or the natural desert of an employe to receive a living wage, even though a living wage be necessary for the reasonable health and comfort of the employe. Even if we admit that it is the ethical or religious duty of an employer to supply this need, still there is no legal basis for compelling him to do so, merely because in some occupation he holds to the person in need the relation of employer to employe.

As has been said by the United States Supreme Court many times, and reiterated by the dissenting opinion in the *Lochner* case, a court should declare such statute invalid if it, though "purporting to have been enacted to protect the public health, the public morals or the public safety, *has no real, substantial relation* to those objects, or is, beyond all question, a plain, palpable invasion of the rights secured by the fundamental



law."<sup>88</sup>

No statutory regulation of labor, whether as to labor conditions, hours or wages which involved a payment or charge upon the employer in favor of the employe has ever been sustained, unless such charge has been to compensate the employe for or to relieve him from some hazard or disadvantage arising directly out of the employment in question. On this principle, hours may be restricted as to employes to whom in the occupation in question longer hours are unhealthy or dangerous. Safe and healthful conditions of work may be required, including safety appliances in machinery. Also, under workmen's compensation acts, casualty from accident in the employment may be insured against at the expense of the employer. It could never be seriously claimed, however, that an employer could be compelled to provide reasonably necessary sick benefits or death benefits for his employe or employe's family, on the ground that such misfortunes occurred directly or indirectly to the employe while employed,—meaning, of course, sickness and death of the employe, or members of his family, which are not results of contact with the employment. Nevertheless, such benefits would be promotive of the health and comfort of the employe and are included in the reasonable necessities of life. Such benefits cannot be imposed where their necessity does not originate from the employment itself. For the same reason, the minimum wage benefit is entirely different from other statutory benefits to employes, at the expense of the employer, which have been sustained by the courts. The fulfilling of the necessity in question is, as a general proposition, promotive of health, morals and comfort, but it is not a necessity which arises out of the employment, nor one which is connected with it. So far as considerations of legal obligations are concerned, the employer is a stranger to such necessities. Therefore, he cannot be compelled by law to pay a wage based solely upon the living necessities of the employe.

#### THE OREGON CASE—WOMEN IN LAUNDRIES.

The case of *Muller v. Oregon*, 208 U. S., 412, is cited in support of this minimum wage statute for women employes, as

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<sup>88</sup> *Lochner vs. New York*, 198 U. S., Dissenting Opinion, p. 68.

establishing a right of the legislature, under the police power, to have enforced this legislation as to women employes, which, it is demonstrated, under the decisions already cited, could not be enforced as to adult male employes. It is claimed that this case establishes the right to place women as a class under the purview of statutes regulating hours and wages and other conditions; and that such restrictions may be made applicable to any and all occupations independently of the question of any hazard to safety, health or morals peculiar to the occupation in question.

On the contrary, this Oregon case again confirms the proposition upon which my argument is based, that in order to warrant such restrictions, with reference to any occupation, on the ground of police power to protect against hazards to safety or health or morals, the hazard in question must be shown to arise from the occupation in question and in connection with the employment in question. More than that, a restriction as to hours might be justified as having "real, substantial relation" with the purposes of the statute. But a regulation requiring a living wage would have no relation whatever to the occupation or to the employment in question.

The Legislature of Oregon passed an act limiting the hours for work by females "in any mechanical establishment, or factory, or laundry in this state more than ten hours during any day." The question in this case was as to whether the prohibition as applicable to laundries could be enforced.

Now, from what has already been said, and before we proceed to examine the decision of the federal supreme court in this Oregon case, we can readily see that the principles which we have stated, as already drawn from the decisions above noted, would be confirmed or repudiated in the Oregon case according to whether the basis of that decision was one or the other of the following propositions:

(1) The occupation of laundry women, as laundries are generally conducted, involves such requirements of the employe that excessive hours would hazard the safety and health of the employe in question; and, furthermore, as the employes in question are women, the hazard involved is peculiarly dangerous to women; or

(2) Under the police power restrictions may be applied to women employes as a class, irrespective of the character of the occupation or kind of employment in which their work is done, and irrespective of the kind of work which the women employes in question have to do in that occupation, and also irrespective of whether or not the hazard to their safety, health and comfort, against which it is the object of the act to protect them (in the case of the minimum wage statute it is the abstract right to or need of a living, and is not a question of hours) has, in the words of the Court, "any real or substantial relation" to the objects sought to be accomplished.

Now, a reading of that decision shows that it is based exactly upon the former proposition and that it squarely repudiates the latter proposition. The case, therefore, not only fails to support the argument for the constitutionality of the minimum wage statute, but is directly against it.

The Court held that an occupation might be injurious to a woman employe when it was not to a man, and that, therefore, hours of more than ten a day for a woman might be prohibited, if the facts warranted, when such prohibition in the case of a man would not be sustained; and that this distinction, when reasonably made the basis of a statute, would be sustained.

Then, referring to the occupation in question, that of a woman worker in a laundry, requiring her day after day to be for a long time on her feet at work, it was held that the State Legislature was warranted in finding that there was as to women a peculiar hazard to health, if the hours were not restricted. This is the scope and limit of that decision. The Court said:<sup>39</sup>

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, respecting this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offsprings, the physical wellbeing of woman becomes an object of public interest and care in order to

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<sup>39</sup> Muller vs. Oregon, 208 U. S., 412, 421-23.

preserve the strength and vigor of the race.

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions — having in view not merely her own health, but the wellbeing of the race — justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous

health upon the future wellbeing of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

"We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

"For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, *so far as it respects the work of a female in a laundry*, and the judgment of the Supreme Court of Oregon is affirmed."

#### THE CASE OF NOBLE STATE BANK V. HASKELL, 219 U. S. 104.

It is now a little over three years since the question of the extent of the police power of the state was discussed by the Federal Supreme Court in the case of *Noble State Bank v. Haskell*. Since then, two sentences, picked out of that decision and disconnected with their context or application, have been quoted as supporting every extreme theory repugnant to the fundamental principles of our constitutional system of government. They have been the solace and plaything of visionaries. They have been put forward as authoritative support, from the highest judicial tribunal, of every political vagary which has been advanced since they were uttered. From them the socialist claims not only justification for his creed, but also a promise of the effective accomplishment of his ends, and this, too, by the instruments by which he has said he would work out those ends; because, under his construction, they would compel all constitutional protection to property to yield to the forces of a "preponderant opinion." The pseudo-reformer who confounds change with progress cites these excerpted sentences as authority in favor of his proposition to do away with all constitutional safeguards and to turn every judge and every judicial decision over to the arbitrary caprice of a temporary majority.

Every possible change in the administration of the law or in our system of government is advanced not only as justifiable, but as feasible and consistent with constitutional law; because, as it is alleged, these excerpts extend the limits of the police power as theretofore established and make the police power of the respective states, without limit, paramount to every other constitutional consideration.

In the same way they are cited by advocates of the constitutionality of the minimum wage statute as involving a new doctrine with regard to the police power in accordance with which all objections to the constitutionality of that statute are overcome.<sup>40</sup>

These sentences are, in the words of Justice Holmes, who wrote the decision:

"It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."<sup>41</sup>

I have often thought how Justice Holmes, when he hears the attempted application of these sentences, must yearn to divest himself for a time of his judicial position, which prohibits his answering directly the many distortions and misapplications of these phrases, and to answer personally some of the claims which are made with regard to them. I venture the surmise that already, if we would read between the lines, he has suggested some such answer in his speech less than a year ago when he inveighed against any policy founded upon an unreasonable misapprehension of the significance of free competition in business, of private ownership and of private investments. He said:<sup>42</sup>

"We are apt to think of ownership as a terminus, not as a gateway; and not to realize that, except the tax levied for personal consumption, large ownership means investment, and investment means the direction of labor toward the production of the greatest returns, returns that so far

<sup>40</sup> Report Massachusetts Commission on Minimum Wage Boards, 1912, page 24; and "Minimum Wage Legislation," by John A. Ryan, Catholic World, February, 1913.

<sup>41</sup> Noble State Bank vs. Haskell, 219 U. S., page 104, 111.

<sup>42</sup> Speech of Mr. Justice Holmes at dinner of the Harvard Law Association of New York, Feb. 15, 1913, S. Doc. No. 1106, 62d Cong., 3d Sess.



as they are great show by that very fact that they are consumed by the many, not alone by the few. If I might ride a hobby for an instant, I should say we need to think things instead of words; to drop ownership, money, etc., and to think of the stream of products, of wheat and cloth and railway travel. When we do, it is obvious that the many consume them; that they now as truly have substantially all there is as if the title were in the United States; that the great body of property is socially administered now; and that the function of private ownership is to divine in advance the equilibrium of social desires which socialism equally would have to divine, but which under the delusion of self-seeking is more poignantly and shrewdly foreseen."

What Justice Holmes said in the Oklahoma Bank case was no new doctrine of the police power, nor a rule extending any former doctrine. As he protests (in his opinion denying reargument) :

"The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power."<sup>42a</sup>

In former cases the Supreme Court, speaking through Justice Holmes and through Justice Brewer, had said what was intended to be the same, and to have the same application, as was stated by Justice Holmes in the Oklahoma case. In the *Lochner* case, Justice Holmes had said:<sup>43</sup>

"A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I

<sup>42a</sup> 219 U. S., p. 580.

<sup>43</sup> *Lochner vs. New York*, 198 U. S. 45, 75-6.



think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health."

Again, with reference to the claim that a woman's peculiar physical structure and duties would make an employment in which she is required to stand for long hours hazardous and peculiarly hazardous to her as a woman, Justice Brewer had said:<sup>44</sup>

"The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."

The decision in the case of *Muller v. Oregon* expressly confirms the principle and the holding of the both opinions in the case of *Lochner vs. New York*. The decision in the Oklahoma case of *Noble State Bank vs. Haskell* expressly confirms the principle and holding in both these former cases, and in others.

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<sup>44</sup> *Muller vs. Oregon*, 208 U. S., 412, 420-1.

There was no new principle and no extension of former principles announced nor intended to be announced in the Oklahoma Bank case. The question there was as to the police power of the State of Oklahoma to regulate banking within the state and to provide guaranties under the authority of the State and under its direction against the insolvency of banks organized, maintained and operated with the sanction and under the authority of the State. It was held that the compulsory assessments, for the purpose of making up the guaranty fund, provided to be paid by the various banking institutions were, under all the circumstances, within the police power of the State.<sup>45</sup>

There is absolutely nothing in that case from which it can be argued that it is within the police power of a State to compel the payment of a minimum wage in connection with employment in any occupation, without distinction as to kind, and especially when the basis of the attempted exercise of the police power is merely a personal need,—having no relation to the occupation or employment itself,—of the employe.

#### A LEGISLATIVE MINIMUM WAGE FOR PRIVATE EMPLOYMENT IS UNCONSTITUTIONAL.

Having shown that the authorities cited in support of a legislative minimum wage do not furnish any such support, but rather the contrary, I next cite authorities expressly passing upon minimum wage statutes.

The Legislature of Indiana passed an act prohibiting under penalty any employer engaged upon public work of the state, counties, cities or towns from paying for any unskilled labor less than twenty cents an hour. The Supreme Court of Indiana held the act unconstitutional as infringing the liberty of the citizen, that it was class legislation, and had the effect to deprive the employer of his liberty and property without due process of law, and denied to him the equal protection of the laws. The question in this case was different from that decided in the case of *Atkin vs. Kansas*, 191 U. S., 207. There the only question was the right to legislate *as to hours* of employes

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<sup>45</sup> *Noble State Bank vs. Haskell*, 219 U. S., 104.

engaged in *public work*, irrespective of the hazards of the work. This, as we have seen, was decided on grounds independent of any question of police power, but was based solely on the power of the State to legislate as to the terms and conditions under which work for itself,—that is, public work—should be done. The Washington Supreme Court, in the case of *Malette vs. Spokane*, decided December 31, 1913, as we have seen, extended that rule to a minimum wage for laborers employed in public work. The Indiana Supreme Court, however, refused to extend the application of the rule in *Atkin vs. Kansas* to a compulsory minimum wage in public work. It will be for the Supreme Court of the United States to say which of these two state courts has been right in regard to these decisions. The question of the minimum wage even in public work has not yet been decided by the Federal Supreme Court. It is certain that if that court should sustain the Washington decision, or reverse the Indiana decision, it will be on the ground that because the employment involved is public work, there is no question involved as to police power, and this for the same reasons as stated in the case of *Atkin vs. Kansas*. Accordingly, then, though the Federal Supreme Court shall sustain the power of the State to fix a minimum wage in public work, such decision will in no wise support the claim of the right of the State to fix a minimum wage in private employment. On the other hand, if the Federal Supreme Court shall refuse to confirm such power in the State, it will be for the reason that a minimum wage, even for public work, does not come within the power of the State, either as controlling to that extent its own contracts, or under any proper exercise of police power.

The Indiana Supreme Court approached the question as though it stood upon the same ground as would a legislative minimum wage in private employment. We have, therefore, in the decision of the Indiana Supreme Court, the views of the highest court of one of the states with respect to the power of the State to fix the minimum wage in private employment. In deciding that such attempted exercise of power was unconstitutional, and did not come within the proper exercise of the State's police power, the Indiana Court said:<sup>46</sup>

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<sup>46</sup> *Street vs. Varney Electrical Co.*, 160 Ind., 338.

"If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise, and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by the English Parliament, in the worst of times, were the statutes of labor of Hen. VI and Edw. III. *These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own country, required him to work for the first employer who demanded his services, and punished every violation of the statute with severe penalties.* In the very nature and constitution of things, *legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions.* The circumstance that the act of March 9, 1901, reverses the conditions of the statutes of labor of Hen. VI and Edw. III, and lays the burden and the penalty upon the employer instead of the laborer, does not render it any less pernicious and objectionable as an invasion of natural and constitutional rights. Statutes similar to this have been before the courts of other states, and in nearly every instance have been held unconstitutional. *People, ex rel., Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *State, ex rel., Bramley v. Norton*, 5 Ohio, N. P. 183; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Jones v. Great Southern Fireproof Hotel Co.*, 79 Fed. 477; *State v. Julow*, 129 No. 163, 29 L. R. A. 257, 31 S. W. 781; *Shaver v. Pennsylvania Co.*, 71 Fed. 931; *Atkins v. Randolph*, 31 Vt. 237; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Cleveland v. Clements Bros. Constr. Co.*, 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885.

"The statute of March 9, 1901, is obnoxious to the further objection that through its operation a citizen may be deprived of his property without due process of law. If the minimum price to be paid by municipal subdivisions of the state for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, then the excess so paid for labor on public improvements is taken from the citizens assessed for such works, not by due process of law, but by a mere legislative

fiat. The citizens of the state, who must, through assessments made upon their property, pay for the public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the state may be able to secure by contract. They cannot be required arbitrarily to pay higher wages than laborers employed on private works or improvements in their particular district demand, any more than they could be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business. If the minimum rate fixed by the statutes exceeds the market value of such wages, the excess is a mere donation exacted under color of law from the citizens liable to assessment for the public improvement, and bestowed upon the unskilled laborer. Public revenues cannot be applied in this way. *McClelland v. State*, 138 Ind. 321, 37 N. E. 1089; *State ex rel., Tieman v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 309.

Lastly, we think the statute obnoxious to the objection of class legislation. In fixing the minimum rate of wages to be paid for unskilled labor to be employed by counties, cities, and towns, on public improvements, a classification is made which is unnatural and unconstitutional. The laboring men of the state may, for some purposes, constitute a class concerning which particular legislation may be proper. This classification has been recognized and sustained in statutes requiring the payment of wages in lawful money of the United States, forbidding the assignment of future and unearned wages, and in similar acts. But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum rate of wages at which it shall be employed by counties, cities, and towns on their public works. Why exclude the skilled mechanic from the benefits of the act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience, and a higher degree of intelligence? Unless the Legislature has the power to fix the minimum rate of wages to be paid by counties, cities, and towns to carpenters, stone masons, brick layers, plumbers, and painters employed on local improvements, treating each trade as a separate class, it has not the power to enact laws fixing the compensation of unskilled laborers employed on similar works. No sufficient reason has been

assigned why the wages of the unskilled laborer should be fixed by law, and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to themselves such compensation for their work as the conditions of supply and demand, competition, personal qualities, energy, skill, and experience may enable them to do.

After the most careful and thorough examination of all the questions of law presented by the demurrer in this case, we are satisfied that the ruling of the lower court was not erroneous, and its judgment is therefore affirmed."

The highest authority on the law of *Master and Servant*, after a consideration of all the modern arguments for and against a minimum wage in private employment, holds that there is no authority or power in a State to establish or enforce such a wage:<sup>47</sup>

"In the American States it would seem that no legislation of this type has ever been enacted, except with respect to public employments. *So far as respects work in which neither the state itself nor any political subdivision thereof is concerned*, there can be no reasonable doubt that, even where the matter is not covered by an explicit provision in an organic law, a restrictive statute would, under the general principles of American constitutional jurisprudence, be treated by the courts as invalid, whatever might be the nature of the business affected."

Judge Cooley, the greatest authority of modern times, on constitutional limitations, says:<sup>48</sup>

"In the early days of the Common Law, it was sometimes thought necessary in order to prevent extortion to interfere by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty."

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<sup>47</sup> Labatt's *Master and Servant*, Section 846, page 2285.

<sup>48</sup> Cooley's *Constitutional Limitations*, page 820.



The establishment of the right to regulate prices in a certain public or quasi-public enterprise operated under grants from the State, furnishes no parallel. In such cases, so far as private property is affected, the private property is used under a public grant and for that reason subjected to regulation by the State, including the regulation of rates. The public, through the State, has a certain interest carrying with it the right of control necessary to regulate such rates. Before the adoption of the Fourteenth Amendment, this right in the State was carried to an extreme in fixing maximum charges, and even at arbitrary rates, for all classes of industries. But with reference to such regulations, the Federal Supreme Court has said:<sup>49</sup>

“Down to the time of the adoption of the Fourteenth Amendment it was not supposed that statutes regulating the use or even the price of the use of private property *necessarily* deprived an owner of his property without due process of law. Under some circumstances they may, but not in all. \* \* \* This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and without its operative effect. Looking then to the common law from whence came the right which the Constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. \* \* \* When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use.*”

Certainly the occupations of the merchant, wholesale or retail, and other occupations made subject to the minimum wage statutes, are not of the class specified by Judge Cooley as being subject to price regulation, either in the form of minimum wage regulation, or otherwise.

#### AMENDMENT OF A STATE CONSTITUTION AUTHORIZING A MINIMUM WAGE IN PRIVATE EMPLOYMENT, DOES NOT DO AWAY WITH CONSTITUTIONAL OBJECTIONS.

The constitutional objections here presented to a legislative minimum wage in private employment cannot be avoided by

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<sup>49</sup> *Munn vs. Illinois*, 94 U. S., 125.



mere amendment of the State constitution expressly authorizing the enactment by the State Legislature of such minimum wage. The legislative minimum wage as applied to private employment necessarily restricts the liberty of contract, creates an arbitrary discrimination between one class and another, not only of employers, but also of employes, and compels the employer to contribute, out of his investment and out of his earnings, for the benefit of employes and for their sustenance, as well as for the general public benefit. Such statute, therefore, contravenes the express terms of the Federal Constitution, prohibiting any state from enforcing any law which deprives a citizen of liberty or of property without due process of law, or which denies to any citizen the equal protection of the laws. If such prohibition is also incorporated in a State constitution, a legislative minimum wage statute contravenes both the State and the Federal Constitutions. If the State Constitution is changed so as to permit by terms the minimum wage, that means that its repugnancy to the State constitution is alone removed. The Federal prohibition still remains, and is the supreme law of the land, which it is the duty of all the courts, Federal or State, and a duty imposed upon all State and Federal Judges under express oath, to recognize and to enforce.<sup>50</sup>

These Constitutional obstacles are recognized by all intelligent writers and advocates in favor of the legislative minimum wage in private employment.<sup>51</sup>

The recognition of this constitutional prohibition induced Massachusetts and Nebraska to make their minimum wage statutes non-compulsory. The states of California and Ohio amended their constitutions, either on the theory that such amendments solved the constitutional difficulty presented, or was a necessary step in connection with inserting a minimum wage amendment in the Federal Constitution.

It is safe to assume that neither the "due process of law" clause, nor the "equal protection of the laws" clause will be eliminated by amendment from the Federal Constitution. Such amendment, however, would be necessary in order to permit a

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<sup>50</sup> Article VI, United States Constitution.

<sup>51</sup> "A Living Wage," by John A. Ryan, page 313. Also, *Annals American Academy Political and Social Science*, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, pages 45, 48; and "The Minimum Wage in Great Britain and Australia," by Prof. Hammond, 22, 25.

legislative minimum wage statute in any state, unless a specific amendment to the Federal Constitution be made, expressly permitting a State to enact a minimum wage. Without such amendment, it avails nothing to amend a State constitution; for the Federal prohibition against legislation by the states applies to State constitutions, as well as to State statutes. The question of repugnancy to Federal limitation is determined by the question whether a State statute or a State constitutional provision, one or both, when enforced, has the effect to contravene the prohibitions of the Federal Constitution. In case of such contravention, a State Constitutional provision, as well as a State statute, must be held void.<sup>52</sup>

As stated by the United States Supreme Court:

*“Upon the adoption of the Fourteenth Amendment, whatever their own constitutions may have been, or have subsequently declared—the states became bound, as was the United States by the Fifth Amendment, not to deprive any person of property without due process of law.”*<sup>53</sup>

But there are special features of the Minnesota statute which make it further obnoxious to constitutional objection. Some of these are next discussed.

#### THE MINNESOTA STATUTE PROVIDES FOR NO HEARING FOR THE EMPLOYER AFFECTED.

One of the established requisites of a decree or order compulsory against a person, with a penalty for a breach, is that, in order that such decree or order shall be binding upon him, he shall have the opportunity of a proper hearing upon notice, and an adjudication in proceedings to which he is a party. The Minnesota statute in question in substance gives to the Commission power to promulgate and have enforced its order establishing a minimum wage for any particular employer by a course of proceedings to which such employer is a stranger. The only provision for hearing or notice to the employer is (Sec. 6) that after the final order is promulgated, “a copy of such order shall be mailed, so far as practicable, to each em-

<sup>52</sup> *Bigelow vs. Draper*, 6 N. D., 152.

<sup>53</sup> *S. W. Oil Co. vs. Texas*, 217 U. S., 114, 119.

ployer affected," and "filed with the Commissioner of Labor." Nevertheless, whether the employer receives such notice, or not, he is subject, if he does not comply with the order, to both criminal and civil prosecution.

More than that, there is no provision, even subsequent to the promulgation of such order, for the employer to have determined the question of legality or of reasonableness of the wage rate established.

It would not seem necessary to argue that such provisions, independent of all other questions, would fail to constitute due process of law.

The situation is entirely different from that of a legislative commission establishing rates at which a common carrier must do business for the public. In the present case, a commission presumes to establish a compulsory payment, not to, but by, a private employer. That payment is of the nature of an assessment against an individual *in invitum*, the amount of which is determined by the commission. In such cases the individual bound to pay the assessment must be a party to the proceedings by which its amount is determined. Otherwise, he cannot be compelled to pay. This rule has been established by the Federal Supreme Court.<sup>54</sup>

**THE STATUTE IS VOID, BECAUSE IT MAKES THE ORDER OF THE COMMISSION FINAL WITHOUT THE RIGHT TO REVIEW BY THE COURTS.**

Even in the case of statutes authorizing Commissions to fix the rates of public service corporations, such statutes are void, if the order of the Commission is made final, without review. Such is the holding of the Federal Supreme Court in the case of a Minnesota Statute giving the State Railway and Warehouse Commission power to fix railroad rates of a common carrier with no power of review on application of the carrier. Referring to the statute, the Court said:<sup>55</sup>

"It conflicts with the Constitution of the United States in the particulars complained of by the railway company.

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<sup>54</sup> Central of Georgia Ry. Co. vs. Wright, 207 U. S., 127.

<sup>55</sup> Chicago, etc., Ry. Co., vs. Minnesota, 134 U. S., 459.

It deprives the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and constitutes therefore as an absolute finality, the action of a railroad commission, which in view of the powers conceded to it by the state court cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. \* \* \* The question of the reasonableness of a rate or charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and insofar as it is thus deprived where other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the law."

#### THE STATUTE DELEGATES LEGISLATIVE POWER.

The Commission is empowered to establish a minimum wage rate on a basis which is in effect simply the arbitrary dictum of the Commission. There is no reasonable or tangible fixed basis of computation by which the Commission is bound. The provision that such minimum wage shall be a living wage, and that that shall mean a wage "sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life," does not furnish the definiteness of a basis for computation, requisite to avoid the objection here made.

Such delegation of power without definite provisions as to its exercise, is void. On this ground the Minnesota Supreme Court decided that a delegation of power to the State Insurance Commissioner to dictate a standard form of insurance policy, conforming to the New York Standard Policy "as near as the same can be made applicable," was void.<sup>56</sup> The basis of the objection

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<sup>56</sup> Anderson vs. Manchester Fire Assurance Co., 59 Minn., 182.

to the delegation of such legislative power is stated in a recent Wisconsin case where the court said :<sup>57</sup>

“The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointees or delegate of the legislature, so that, in form and substance, it is a law, in all its details, *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event. Instead of preparing a form of standard policy, and adjusting it to the existing legislation, or modifying such legislation, if necessary, by virtue of its constitutional functions, the legislature delivered over this task wholly to the insurance commissioner, to accomplish it as nearly as might be; and this depended wholly upon his discretion and judgment as to what the law should be in this respect, for the act had not specifically declared it. Conceding that the legislature must have adopted the New York form as an entirety, by the use of general language, it is evident that the proposed form, to conform ‘as near as can be to the form adopted in New York,’ involved a duty equivalent to that of revision, which it cannot be contended can be delegated except to legislative approval. While the commissioner, within the discretion intrusted to him, might have approximated, in a great degree, to the policy which the legislature may have intended, the objection, in view of the consideration stated, that it has not received the legislative sanction, is necessarily fatal to it. \* \* \* For these reasons, we hold that the provision authorizing the insurance commissioner to prepare, approve, and adopt a printed form, in blank, of a contract or policy of fire insurance, together with such provisions, agreements, or conditions, as may be endorsed thereon or added thereto, and form a part of such contract or policy, and that such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known, is unconstitutional and void.”

Now, this minimum wage statute fixes no standard by which it can be determined what is a necessary comfort, nor what are the “conditions of reasonable life,” nor what is “sufficient to maintain the worker in health.” What is necessary for one person, is not necessary for another. Standards of living are

<sup>57</sup> Dowling vs. Lancashire Ins. Co., 92 Wis., 63.

recognized to be different. The determination of the wage rests entirely in the discretion of the Commission. So far as such discretion is required, it is a legislative discretion, and such discretion cannot be delegated.

**THE STATUTE CREATES DISCRIMINATION (1) BETWEEN EMPLOYERS OF THE SAME CLASS; (2) BETWEEN EMPLOYEES OF THE SAME CLASS; (3) RESTRICTS THE LIBERTY OF CONTRACT; AND (4) HAS THE EFFECT TO TAKE THE PROPERTY OF THE EMPLOYER FOR THE BENEFIT OF OTHERS,—ALL CONTRARY TO CONSTITUTIONAL PROHIBITIONS.**

It is not necessary to argue further in detail that the statute has all the effects just enumerated. Such effect of the statute is assumed by all who argue in favor of its constitutionality, and who, therefore, base the power of the State to make and enforce such statute on the police power, the exercise of which in proper cases, it is recognized, may have the effect, indirectly or in some instances directly, to conflict with private personal or property rights.

It should be kept in mind, however, that these discriminations and damage to personal and property rights, arising out of the enforcement of such a law, are not merely theoretical but are serious and may be disastrous to the business or industry affected.

As already shown, the enforcement of such a statute, by raising the normal expense account of the employer affected, creates a discrimination against him and in favor of other employers in the same occupation, situated not only in other localities of the State, if the rates fixed vary in different localities, but also in favor of his competitors located outside of the state where no such law, or where a different rate under a similar law, is enforced. There results a tendency to depress an industry in one locality as against a similar industry in other localities, or in one state as against similar industries in another state. The depression may be only to the extent of a diminution of profits. But it may, and in many cases probably would, extend to an entire deprivation of profits, and therefore the closing out of the business or industry affected. Employers whose expenses are thus increased cannot re-



coup themselves by a rise in prices, because of competition in localities where business is not similarly affected. If such difficulties were overcome by a uniform minimum wage law, co-extensive with the markets controlling the prices of the product in question, then the cost of living tends to increase and at the same time, of course, the standard by which the minimum wage is computed also rises, with no resultant benefit to the wage earner. An arbitrary discrimination is also created between the employes themselves, without any legal basis for the distinction made in the classes of employes, in the application to labor of the minimum wage.

As we have seen, there can, under the Minnesota statute, be given no consideration to the experience, capacity or ability of the different employes to whom the minimum wage is applied. The basis of computation must be the same for all classes, and the standard of living must be taken as the same for all. No allowance can be made for the value to the employe of the opportunity for practical instruction; he is deprived of any wage until he shall reach the efficiency measured by the wage fixed. As we have seen, also, the result in any occupation will be to eliminate from employment all those whose efficiency is not proportionate to the minimum wage; for no employer can be compelled, and could not be expected, especially under vain threats of enforcing compulsion, to pay for labor more than it is worth.

As we have already seen, another resulting tendency is to make the minimum wage established also the maximum wage. At the same time that lower wages are artificially and by compulsion brought up to a minimum standard, the inevitable result is to make the wages above the minimum to remain stationary, or to be diminished to or towards the minimum. Such difficulty can be obviated only by the fixing of wages for all classes of labor, both minimum wages, and those above the minimum. This, of course, cannot be accomplished by legislative enactment; although it has been done in certain occupations through the co-operative agency of trades unionism. The legislative minimum wage is antagonistic to trades unionism, and by that I mean to the features of trade unionism which are generally recognized as proper and efficient.



It is obvious, without further argument, that the well recognized personal privilege and liberty of contract, both of employe and employer, are diminished by the enforcement of the minimum wage statute. The resulting disadvantages are altogether, I believe, to the employe, more than to the employer; but the fact that the employer is thereby prejudiced is sufficient to require a holding by the courts that the statute is void, unless it can be held as a proper exercise of the police power.

Manifestly, the enforcement of such statute has the effect to compel the private employer to contribute money for the benefit of others, whether these others be regarded as individuals or the general public. It results in an arbitrary assessment upon the employer for the benefit of others.

This, and other effects of the law, including those already discussed, make it repugnant to constitutional prohibitions; because no theory of the police power can warrant its enforcement by the courts. This lack of warrant for claiming the power to enact and enforce this sort of legislation has already been shown.

### CONCLUSION.

There is no attempt in this discussion to contravert the theory advanced upon an ethical basis, that every employe has, as a part of his generic right to exist as a person, the natural and moral right to be furnished with sufficient sustenance to maintain life and to maintain him in health and reasonable comfort. This, however, is far from admitting that that natural right of his to receive either proves, or tends to prove, a corresponding duty on the part of one who happens to be his employer to furnish all that sustenance and means for life, health and comfort, or any part of it, except in so far as healthful and comfortable conditions of work, while employed, are concerned.

The forces of the inexorable law of supply and demand and of other natural economic laws, cannot with impunity be defied by the legislative fiat of man. Relief from their effects may be achieved, and to a large degree they may be overcome, by co-operative organization. Such co-operation may be promoted by proper constitutional measures; but the efficacy of any

legislative enactment relating to a minimum wage is not so much from its compulsory features as it is from its encouragement and assistance to the co-operation of those more benevolently inclined or having a higher ethical sense. For this reason, the non-compulsory statutes of Massachusetts and Nebraska are based upon a scientific theory and consistent with and promotive of practical benefit for the classes who are intended as the beneficiaries of such legislation.

A compulsory legislative minimum wage necessarily results in such disarrangement of the conditions of labor, trade, commerce and industry, that the evils resulting require greater remedial agencies for reform than are comprised in any reform attempted through the minimum wage itself. The State has no right to inject such disturbing elements as the compulsory minimum wage into the social and industrial life of its citizens, unless and until it has provided in advance the remedies for the resulting evils. It must provide for the army of lower wage earners who are thereby rendered job-less. It must provide special education for the occupations to which the minimum wage is to be applied. It must raise and maintain the lower class of laborers to the standard of efficiency established by the minimum wage. It must prevent, by stricter immigration laws, the influx into the labor markets of this nation of a continuous stream of incompetents. Until such immigration restrictions are established, no remedy for the evil conditions resulting from the legislative defiance of the natural law of supply and demand, can be adequately provided.

The compulsory legislative minimum wage, particularly as contemplated by the Minnesota statute of 1913, is not only inadvisable, because it is impracticable and unworkable, and because it is inimical to the interests of both employes and employers; but it is also unconstitutional and cannot be enforced against those employers who do not choose voluntarily to submit to the proceedings taken under it.

The police power of the State is not a sufficient basis for such legislation. The regulation of hours or even of wages in public work has no relation to the question, because such regulations are supported upon a basis entirely apart from that of the police power. The decisions sustaining those restrictions upon

private employment which have been sustained in the case of particular employments in connection with particular classes of employes, with the distinction between employments which are hazardous and those which are not, and the distinction as to those which are hazardous to women, although perhaps not to other classes,—all these decisions show that the legislative minimum wage in private employment cannot be based upon the police power.

As already pointed out, the need of the employe in question, which it made the duty of the employer to supply, is a need which does not arise out of the occupation in question, nor out of the connection of the employe in question with that occupation. It is a need which exists independently of the occupation; because the need of an income sufficient to sustain life in health and comfort is a personal need, and not a need arising from the capacity of employe. Even if we assume that there is a natural moral right to have that need supplied, still, the duty to supply it does not rest and cannot be made to rest, as a legal duty, upon the employer.

There are, therefore, lacking the elements upon which to base any such legislation. While the subjects of health, morals, comfort, and general social welfare, are generally speaking the subjects out of which arise the right of the State to exercise its police power in legislation, nevertheless, as has already been shown, the mere insertion in an act of the statement that its purpose is to promote health, morals or comfort, or any other elements of social welfare, does not make the act within the police power of the State. Neither does the mere fact suffice that the results obtained by the act would, in themselves, be promotive of the health, morals or comfort of the beneficiaries for whose advantage the act is intended. In order to impose upon a particular occupation or a particular employer the compulsory burden of contributing, either directly or indirectly, to his employe, whether by concessions or by cash payments, for providing for his health, morals or comfort, it must appear that the object sought to be accomplished by the act has some "real, substantial relation" to the occupation of the employer in question or to the employment in question. There is no such source or relation in the case now under discussion; for the need which is to be supplied does not arise from or in connection

with the employment. The fact of employment, therefore, cannot be made the basis of compelling the employer to supply that need.

From the viewpoint of practicability, the Minnesota Minimum Wage Statute is unworkable. From the viewpoint of public policy, it is inexpedient. From the viewpoint of the law, it is unconstitutional and unenforcible.<sup>58</sup>

ROME G. BROWN.

Minneapolis, Minnesota,  
February 2, 1914.

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<sup>58</sup> Since the above was written, the Oregon supreme court has upheld the Oregon Minimum Wage Statute in the case of Frank C. Stettler, Appellant, vs. Edwin V. O'Hara, et al, Respondents, decided March 17, 1914, reported, 139 Pacific Reporter, 743. The basis of the decision is, that in view of a quite extensively expressed "common belief" by certain writers upon social questions, although not directly confirmed by any adjudicated case, "the court cannot say, beyond all question, that the Act is a plain, palpable invasion of rights secured by the fundamental law and has no real or substantial relation to the protection of public health, public morals or public welfare." Therefore, viewing the claim of unconstitutionality as one which is not doubtful "beyond all question," the Oregon court, by holding in favor of constitutionality, permits a review of the question by the Federal supreme court, which review would not be possible in this case if the decision of the Oregon court had been otherwise. This decision shows that the Oregon supreme court overlooked or ignored the distinction, shown in the foregoing discussion, between statutes regulating hours in private employment in order to prevent hazards to the employee arising out of the peculiar nature of the employment, and statutes enacted to supply needs or to prevent hazards which are purely personal to the employee and which do not arise out of or in connection with the employment in question. The failure to observe this distinction is to ignore the distinction between a proper and improper application of the legislative police power. Indeed the Oregon decision is based upon the statement, shown in the above discussion to be erroneous, that "every argument put forward to sustain the maximum hours law or upon which it was established applies equally in favor of the constitutionality of the minimum wage law."

## APPENDIX.

### I.

**THE MINNESOTA STATUTE, CHAP. 547, GENL. LAWS, 1913.**

**An Act to establish a minimum wage commission, and to provide for the determination and establishment of minimum wages for women and minors.**

**Be it enacted by the Legislature of the State of Minnesota:**

**Section 1.** There is hereby established a commission to be known as the minimum wage commission. It shall consist of three persons, one of whom shall be the commissioner of labor who shall be the chairman of the commission, the governor shall appoint two others, one of whom shall be an employer of women, and the third shall be a woman, who shall act as secretary of the commission. The first appointments shall be made within sixty days after the passage of this act for a term ending January 1, 1915. Beginning with the year 1915 the appointments shall be for two years from the first day of January and until their successors qualify. Any vacancy that may occur shall be filled in like manner for the unexpired portion of the term.

**Sec. 2.** The commission may at its discretion investigate the wages paid to women and minors in any occupation in the state. At the request of not less than one hundred persons engaged in any occupation in which women and minors are employed, the commission shall forthwith make such investigation as herein provided.

**Sec. 3.** Every employer of women and minors shall keep a register of the names and addresses of and wages paid to all women and minors employed by him, together with number of hours that they are employed per day or per week; and every such employer shall on request permit the commission or any of its members or agents to inspect such register.

**Sec. 4.** The commission shall specify times to hold public hearings at which employers, employes, or other interested persons may appear and give testimony as to wages, profits and other pertinent conditions of the occupation or industry. The commission or any member thereof shall have power to subpoena witnesses, to administer oaths, and to compel the production of books, papers, and other evidence. Witnesses subpoenaed by the commission may be allowed such compensation for travel and attendance as the commission may deem reasonable, to an amount not exceeding the usual mileage and per diem allowed by our courts in civil cases.

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**Sec. 5.** If after investigation of any occupation the commission is of opinion that the wages paid to one-sixth or more of the women or minors employed therein are less than living wages, the commission shall forthwith proceed to establish legal minimum rates of wages for said occupation, as hereinafter described and provided.

**Sec. 6.** The commission shall determine the minimum wages sufficient for living wages for women and minors of ordinary ability, and also the minimum wages sufficient for living wages for learners and apprentices. The commission shall then issue an order, to be effective thirty days thereafter, making the wages thus determined the minimum wages in said occupation throughout the state, or within any area of the state if differences in the cost of living warrant this restriction. A copy of said order shall be mailed, so far as practicable, to each employer affected; and each such employer shall be required to post such a reasonable number of copies as the commission may determine in each building or other work place in which affected workers are employed. The original order shall be filed with the commissioner of labor.

**Sec. 7.** The commission may at its discretion establish in any occupation an advisory board which shall serve without pay, consisting of not less than three nor more than ten persons representing employers, and an equal number of persons representing the workers in said occupation, and of one or more disinterested persons appointed by the commission to represent the public; but the number of representatives of the public shall not exceed the number of representatives of either of the other parties. At least one-fifth of the membership of any advisory board shall be composed of women, and at least one of the representatives of the public shall be a woman. The commission shall make rules and regulations governing the selection of members and the modes of procedure of the advisory boards, and shall exercise exclusive jurisdiction over all questions arising with reference to the validity of the procedure and determination of said boards. Provided: that the selection of members representing employers and employees shall be, so far as practicable, through election by employers and employees respectively.

**Sec. 8.** Each advisory board shall have the same power as the commission to subpoena witnesses, administer oaths, and compel the production of books, papers, and other evidence. Witnesses subpoenaed by an advisory board shall be allowed



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the same compensation as when subpoenaed by the commission. Each advisory board shall recommend to the commission an estimate of the minimum wages, whether by time rate or by piece rate, sufficient for living wages for women and minors of ordinary ability, and an estimate of the minimum wages sufficient for living wages for learners and apprentices. A majority of the entire membership of an advisory board shall be necessary and sufficient to recommend wage estimates to the commission.

Sec. 9. Upon receipt of such estimates of wages from an advisory board, the commission shall review the same, and if it approves them shall make them the minimum wages in said occupation, as provided in section 6. Such wages shall be regarded as determined by the commission itself and the order of the commission putting them into effect shall have the same force and authority as though the wages were determined without the assistance of an advisory board.

Sec. 10. All rates of wages ordered by the commission shall remain in force until new rates are determined and established by the commission. At the request of approximately one-fourth of the employers or employees in an occupation, the commission must reconsider the rates already established therein and may, if it sees fit, order new rates of minimum wages for said occupation. The commission may likewise reconsider old rates and order new minimum rates on its own initiative.

Sec. 11. For any occupation in which a minimum time rate of wages only has been ordered the commission may issue to a woman physically defective a special license authoring her employment at a wage less than the general minimum ordered in said occupation; and the commission may fix a special wage for such person. Provided: that the number of such persons shall not exceed one-tenth of the whole number of workers in any establishment.

Sec. 12. Every employer in any occupation is hereby prohibited from employing any worker at less than the living wage or minimum wage as defined in this act and determined in an order of the commission; and it shall be unlawful for any employer to employ any worker at less than said living or minimum wage.

Sec. 13. It shall likewise be unlawful for any employer to discharge or in any manner discriminate against any employee because such employee has testified, or is about to testify, or because such employer believes that said employee is about to testify, in any investigation or proceeding relative to the enforce-



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ment of this act.

Sec. 14. Any worker who receives less than the minimum wage ordered by the commission shall be entitled to recover in civil action the full amount due as measured by said order of the commission, together with costs and attorney's fees to be fixed by the court, notwithstanding any agreement to work for a lesser wage.

Sec. 15. The commission shall enforce the provisions of this act, and determine all questions arising thereunder, except as otherwise herein provided.

Sec. 16. The commission shall biennially make a report of its work to the governor and the state legislature, and such reports shall be printed and distributed as in the case of other executive documents.

Sec. 17. The members of the commission shall be reimbursed for traveling and other necessary expenses incurred in the performance of their duties on the commission. The woman member shall receive a salary of eighteen hundred dollars annually for her work as secretary. All claims of the commission for expenses necessarily incurred in the administration of this act, but not exceeding the annual appropriation hereinafter provided, shall be presented to the state auditor for payment by warrant upon the state treasurer.

Sec. 18. There is appropriated out of any money in the state treasury not otherwise appropriated for the fiscal year ending July 31, 1914, the sum of five thousand dollars (\$5,000.00), and for the fiscal year ending July 31, 1915, the sum of five thousand dollars (\$5,000.00).

Sec. 19. Any employer violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished for each offense by a fine of not less than ten nor more than fifty dollars or by imprisonment for not less than ten nor more than sixty days.

Sec. 20. Throughout this act the following words and phrases as used herein shall be considered to have the following meanings respectively, unless the context clearly indicates a different meaning in the connection used:

(1) The terms "living wages" or "living" wages" shall mean wages sufficient to main the worker in health and supply him with the necessary comforts and conditions of reasonable life; and where the words "minimum wage" or "minimum wages" are used in this act, the same shall be deemed to have the same meaning as "living wage" or "living wages."

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(2) The terms "rate" or "rates" shall mean rate or rates of wages.

(3) The term "commission" shall mean the minimum wage commission.

(4) The term "woman" shall mean a person of the female sex eighteen years of age or over.

(5) The term "minor" shall mean a male person under the age of twenty-one years, or a female person under the age of eighteen years.

(6) The terms "learner" and "apprentice" may mean either a woman or a minor.

(7) The terms "worker" or "employee" may mean a woman, a minor, a learner, or an apprentice, who is employed for wages.

(8) The term "occupation" shall mean any business, industry, trade, or branch of a trade in which woman or minors are employed.

Sec. 20. This act shall take effect and be in force from and after its passage.

Approved April 26, 1913.

## II.

### RESOLUTION OF MINNESOTA ADVISORY BOARD REQUESTING ANSWERS TO CERTAIN QUESTIONS.

Whereas, it is not entirely clear what powers and duties of the Commission or ourselves as an advisory board have, or by what methods we shall proceed, in the matter of fixing a living wage, and it is advisable in order that time may be saved and we may do our work speedily and to the best advantage that we be advised upon those matters at once;

Now, therefore, be it resolved that we request the Commission to submit the following questions to the Attorney General for his answer in writing so that we may have them before us for our guidance in our work.

1. Must not the Commission fix a minimum wage in the "Occupation" for the entire state at one time? In other words, can the Commission investigate the minimum wage in any "Occupation" and act upon it within a district less in extent than the entire state? It is claimed by some that the action of the Commission must be with reference to and for the entire state, though in fixing the actual minimum it may vary the minimum in different parts of the state; but though the minimum may differ in various parts of the state they must all be fixed at the same time and as part of the same investigation and proceeding.

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2. Section 5 provides that the Commission shall establish a minimum rate of wages for an "Occupation," if, after careful investigation, the Commission is of opinion the wages paid to one-sixth or more of the women or minors employed therein are less than living wages. Can the Commission fix a minimum wage unless upon such investigation they find that at least one-sixth of the women or minors employed in the "Occupation" within the state are receiving less than living wages? Must they find that one-sixth or more of the women are receiving less than living wages before they can fix minimum wages for women, and that one-sixth or more of the minors employed in the "Occupation" throughout the state are receiving less than living wages before they can fix the minimum wage for minors? Or, can they consider women and minors as belonging to the same class and fix minimum wages for each if they find one-sixth of the aggregate number of women and minors are receiving less than living wages?

Must the Commission fix a minimum for both women and minors in the "Occupation," if they fix a minimum for either?

Can the minimum fixed for women differ in amount from that fixed for minors in the same "Occupation," and, if so, on what basis must the difference be fixed? Can the Commission fix a different minimum for male and female minors in the same "Occupation"?

3. What is an apprentice or learner? By what rule shall the Commission determine what is an apprentice, and what is a learner? Must the minimum for apprentices be the same as for ordinary workers? If not, on what basis must the Commission fix the minimum for apprentices, if the cost of living is to determine the wage?

4. Must the Commission make the minimum apply to all classes without regard to the necessity of the class or of the individual in the class? By what rule, if any, is the Commission to determine what is necessary to maintain the worker in health, and what are the necessary comforts and conditions of reasonable life?

Can the minimum wage be varied or fixed, having in mind the ability of the employer to pay the wage, and having in mind the necessity of the employe to contribute to the support of a family or others dependent?

Must not the wage be fixed solely with reference to the actual needs of the employe of ordinary ability for a decent livelihood for the employe alone, without allowing anything to enable the employe to contribute to the support of a dependent, and with-

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out allowing anything for education or amusement or for clothing or housing beyond that which will afford a minimum of comfort and amusement?

Can the Commission in fixing a minimum wage allow anything off or in reduction because of the advantages, educational or otherwise, which the employe gets from the particular employment?

5. In case the Commission should promulgate a wage rate which was unsatisfactory to some employer or employers, could the employer so objecting be compelled to comply? Would a rate fixed by the Commission in the manner provided by the Minnesota Minimum Wage Statute be enforceable? May we not expect that the court would hold it unenforceable?

This last question is suggested because it certainly is important in determining how far the Commission should attempt to go. It also bears on the question of the advisability of organizing an advisory board, and would also weigh with any person who was considering accepting a position as a member of the advisory board. It would be very embarrassing to go through all the formalities of fixing a wage rate under the statute and then have it declared that there was no power to fix such rate, and no power to enforce it. Such result would also be prejudicial to the final accomplishment of the meritorious object of bringing about a proper wage adjustment.

## III.

### MINIMUM WAGE STATUTES IN OTHER STATES.

*Massachusetts:* (Chapter 706, Acts 1912 as amended by Chapters 330 and 673, Acts 1913).

Wage commission, 3 persons. Duty to enquire into wages of female employes in any occupation in the State if Commission has reason to believe that wages paid substantial number of such employes are inadequate "to supply the necessary cost of living and to maintain the workers in health."

May establish Wage Board as to any occupation; which shall determine the minimum wage, whether by time rate or piece rate, suitable for a female employe of ordinary ability in the occupation in question and also minimum wage for learners and apprentices and for minors below 18 years. Wage Board reports to Commission. If Commission approves, then hearing to employer on 14 days' notice. After such hearing Commission may finally approve and enter decree noting the names of employers who fail or refuse to accept such minimum wage.

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Afterwards if it wishes Commission may publish the names of employers from time to time whom it finds are refusing to follow the recommendation. But employer may file declaration in court asking for review of recommendation by Commission; and if employer sustained, then publication of his name is prohibited.

The only penalty is for discharge of employe for testifying in connection with minimum wage hearing. In case recommendation is by less than two-thirds of a Wage Board the Commission reports the recommendation to the general court. Special licenses provided for.

Commission itself enquires into wages for minors and determines wages with proceedings same as on recommendation by Wage Board for women. Every employer keeps a register. Newspapers compelled to publish at regular rates. No libel action except for willful misrepresentation.

*Nebraska* (Chapter 211, Laws 1913):

Provisions substantially the same as in Massachusetts except that hearing to employer before Wage Board is on 30 days' notice and Commission shall within thirty days after final approval after hearing, publish name of delinquent employers.

*Oregon* (Chapter 62, Laws of 1913):

Commission, 3 members. Duty to fix (a) standard hours of employment for women or minors in any occupation, (b) conditions of labor for women and minors, (c) minimum wage for women in any occupation, necessary "to supply the necessary cost of living and maintain them in good health" and (d) minimum wage for minors "unreasonably low for such minor workers."

Commission may hold public hearings for preliminary investigation and after such investigation if it is of the opinion that any substantial number of women workers in any occupation are working for unreasonable hours or bad conditions or inadequate wages, the Commission may call a Conference which will enquire into the matter and submit its report to the Commission with recommendation. It may recommend minimum wage for women workers of average, ordinary ability, sufficient to supply the necessary cost of living and maintain them in health and may also recommend minimum wages for learners and apprentices which shall be less than that for regular women workers.

On report from the Conference, the Commission review, the same and if it approves it shall then publish a notice not less than once a week for four successive weeks in two newspapers of general circulation, of hearing for people interested; and

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after hearing it may make such order as it deems necessary to carry into effect the recommendation, which order becomes effective sixty days after it is made, and afterwards it is unlawful for employers to disregard such order. Special licenses allowed.

Commission itself may enquire into wages for minors and may issue its order after notice and hearing, as for women workers, which order is compulsory on employers. Commission authorized to make different orders for same occupation in different parts of the state when it deems conditions justify it. All orders of the Commission, except on questions of fact, appealable to the Circuit Court for Multnomah County and from that court to the State Supreme Court. The penalty on employer \$25 to \$100 or imprisonment 10 days to 3 months, or both. Penalty for discharging employe for testifying. Employe may recover excess.

*Washington* (Chapter 174, Laws 1913):

Prohibits employment of women workers "at wages which are not adequate for their maintenance." Creates Commission to establish wages for women workers and minors "as shall be held to be reasonable and not detrimental to health and morals and which shall be sufficient for the decent maintenance of women."

A minor is a person of either sex under 18 years. Commission may hold public hearings on notice; and if after such investigation they find wages of female employes in any occupation inadequate to supply them necessary cost of living and to maintain workers in health, then they call a Conference which may investigate and make recommendations to Commission.

Commission reviews such recommendations, may approve them, and after such approval issue an obligatory order effective in sixty days or longer. After such order it is unlawful for any employer in such occupation to employ women over 18 years of age for less than the rate of wages fixed. Special licenses allowed.

Commission itself determines wages "suitable for minors" and may issue its obligatory order as for women and after such issuance of such order it is unlawful for employer to employ minor for less than the wage fixed. Penalty to employer who discharges for testifying and for violation of commission orders, penalty \$25 to \$100; and employe may recover difference. No appeal from decision of commission upon question of fact but right of appeal to either employer or employe on questions of law.



***Colorado* (Chapter 110, Laws of 1913) :**

State Wage Board, 3 members, to enquire into wages to female employes above 18 years in any mercantile, manufacturing, laundry, hotel, restaurant, telephone or telegraph business to enquire whether wages are "inadequate to supply the necessary cost of living, maintain them in health and supply the necessary comforts of life." After inquiry the Wage Board may fix the minimum wage, when agreed to by two members of the Board. Then the Board gives thirty days' notice for hearing in the locality of the industry affected, by publication in newspaper and mailing copy to the employer affected. After such public hearing the Board may issue obligatory order to be effective 60 days from the date of order; and afterwards it is unlawful for any employer to fail to comply with the order, which order is to be published and served personally.

Any employer affected may appeal to the courts on the ground that the order is unlawful or unreasonable, but the evidence considered on such appeal is confined to the evidence presented to the Board in the case from the decision in which the appeal is taken. Further appeal allowed to the Supreme Court. Penalty to employer for not complying with order is fine not to exceed \$100 or imprisonment not more than 3 months, or both. Penalty for discharging employe; and employe may recover difference. Special licenses provided for.

***Wisconsin* (Sections 1729, s—1 to 12, Statutes 1913; Chapter 712, Laws 1913) :**

Wages less than living wage to any female or minor employe prohibited. "Living wage" defined to mean compensation by time or piece work or otherwise "sufficient to enable the employe receiving it to maintain himself or herself under conditions consistent with his or her welfare."

The Industrial Commission, already established, given jurisdiction to investigate, ascertain, determine and fix living wage pursuant to Sections 2394-41, etc., relating to industrial commission, providing that Commission may investigate upon notice and hearing and promulgate orders. But on petition of employer Commission shall allow special hearing on the reasonableness of any order, which hearing shall be had; and afterwards any order of the Commission is subject to review by application of employer to court against the Commission as defendant to vacate and set aside order; which action is brought by complaint with summons with power of injunction on hearing, with power of court to review or re-submit to the Commission. Penalty to employer not less than \$10 nor more than \$100 for each failure to comply with Commission's orders, each



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day's fault to constitute offense.

Commission may establish Advisory Board. Provisions as to minors who shall have no trade, etc. Commission may grant special licenses to employe unable to earn the wage, permitting such employe to work for a wage stated which is commensurate with his or her ability. No such licensee shall be employed at less than the wage fixed.

*Ohio* (Constitutional Amendment, adopted Sept. 3, 1912) :

Amended constitution by adding articles providing that "laws may be passed fixing and regulating hours of labor, establishing a minimum wage and providing for comfort, health, safety and general welfare of all employes," etc.

*Utah* (Chapter 63, Laws of 1913) :

Makes it unlawful for any regular employer of female workers to pay any women less than the wage herein specified, to-wit: Minors under 18 years not less than .75c per day; adult learners and apprentices not less than .90c per day (1 year constitutes apprentice period); for adults who are experienced in the work they are employed to perform, not less than \$1.25 per day.

Regular employers of female workers shall give certificate of apprenticeship, for time served by apprentices. Any regular employer of female workers paying less than the wage specified guilty of misdemeanor.

*California* (Chapter 324, Statutes 1913) :

Commission of 5 members with duty to ascertain wages, hours and conditions of labor, etc., in various occupations in which women and minors are employed. If, after investigation (state-wide), wages of women and minors found inadequate to supply the cost of proper living in any occupation, Commission may call a conference, that is, "Wage Board," whose deliberations are made a matter of record. Wage Board may inquire and report to the Commission its findings as to the minimum wage adequate to supply to women and minors engaged in the occupation in question "the necessary cost of proper living and to maintain the health and welfare of such women and minors."

Commission has power after public hearing to determine minimum wage for women and minors in any occupation. Such hearing is on public notice in newspapers and by mailing copy to each county recorder not less than fourteen days before hearing. After such hearing Commission may make a mandatory order effective in sixty days, specifying minimum wage for women or minors in the occupation in question. No order

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to become effective until after April 1, 1914. Order published and recorded in each county and mailed to each employer in question. Special licenses allowed.

Penalty for discharging employes or for disregarding order, not less than \$50 and imprisonment not less than thirty days, or both. Employe may sue for difference. On appeal from order, the findings of fact made by Commission are, in absence of fraud, conclusive. Appeal within twenty days allowed to Superior Court of certain counties. Answer by Commission with return by Commission of all documents and papers and testimony and evidence. The court may confirm or set aside on grounds (1) that Commission acted in excess of its powers and (2) that its decision was procured by fraud. Either party may appeal from Superior Court to the Supreme Court.

ALSO IN CALIFORNIA (Chapter 98, Proposal Constitutional Amendments 1913). Proposes amendment to State Constitution authorizing legislature to establish minimum wage for women and minors.





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**MINNEAPOLIS, MINNESOTA**

36.

**OREGON MINIMUM WAGE CASES**

**Reargued January 18-19, 1917**

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**Supreme Court of the United States**

**OCTOBER TERM, 1916.**

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**No. 25.**

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**FRANK C. STETTLER,**

*Plaintiff in Error,*

**VS.**

**EDWIN V. O'HARA, BERTHA MOORES AND AMEDEE M. SMITH,  
CONSTITUTING THE INDUSTRIAL WELFARE COMMISSION OF THE  
STATE OF OREGON,**

*Defendants in Error.*

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**No. 26.**

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**ELMIRA SIMPSON,**

*Plaintiff in Error,*

**VS.**

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**IN ERROR TO THE SUPREME COURT OF OREGON**

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**Brief and Argument for Plaintiffs in Error on  
Re-argument.**

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**Brief and Argument for Plaintiffs in Error on  
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## Statement of Case

These two cases are set to be heard together. The issues involved are similar, and the two cases will in this brief be discussed as one case. The points of difference will be noted by referring to No. 25, the employer case, as the "*Stettler*" case and to No. 26, the employee case, as the "*Simpson*" case. In making references to the Transcript of Record, references to the record in 25 will be made by the term "*Stettler* Record" and in 26 by the term "*Simpson* Record." In the "Appendix" to this brief is reproduced for convenience, (1) the provisions of the Constitution of the State of Oregon to which reference is made, (2) the Oregon Minimum Wage Statute here in question, (3) the opinion of the Supreme Court of Oregon in the *Stettler* case, and (4) the opinion of that court in the *Simpson* case.

These cases were argued and submitted to this court on December 17, 1914. No decision was filed upon that submission. Subsequently, in about June, 1916, both cases were, by order of this court, restored to the October, 1916, calendar for reargument. In accordance with that order they are now before this court upon reargument.

These cases come to this court upon writs of error to the Supreme Court of the State of Oregon for review of the final judgments of the highest court of that state in these cases, in both of which the validity of the Oregon Minimum Wage Statute is drawn in question on the ground of repugnance to the Constitution of the United States, and in which the judgments here in question are in favor of the validity of that State Statute. The *Stettler* case is a suit by an employer to enjoin the enforcement of the Statute. The *Simpson* case is by an employee for the same purpose. In both cases all the facts which are the basis of the decisions complained of, including the federal questions raised by the plaintiffs in error, are set forth in the

complaints. The suits were instituted and first decided in the Circuit Court of the State of Oregon for Multnomah County, upon demurrers to the complaints.

In the *Stettler* case an amended complaint was filed on November 5th, 1913 (*Stettler* Record, p. 5), and was heard upon the demurrer filed to the original complaint on October 25th, 1913, but which demurrer was by stipulation of November 6th, 1913, made as the demurrer to the amended complaint (*Stettler* Record, pp. 11-12). On hearing on demurrer in the Circuit Court the demurrer to the amended complaint was sustained. The plaintiff refused to plead over and stood upon his amended complaint; whereupon judgment of dismissal upon the merits was rendered and entered in that court (*Stettler* Record, pp. 12-13). From that judgment plaintiff appealed to the State Supreme Court; where final judgment was entered on March 17, 1914, affirming the judgment below (*Stettler* Record, pp. 25-26). Thereupon the plaintiff in error brought the case here for review of that final judgment, upon writ of error (*Stettler* Record, pp. 26-33).

In the *Simpson* case, the complaint was filed in the same court on April 15, 1914, and demurrer was filed thereto on April 15th, 1914; and on the same day there was entered in that court a decree sustaining the demurrer and plaintiff refused to plead over and stood upon her complaint; whereupon judgment was entered, dismissing the case upon the merits (*Simpson* Record, pp. 5-12). Upon appeal to the State Supreme Court that court entered final judgment on April 28th, 1914, affirming the judgment below (*Simpson* Record, pp. 15-16). Upon writ of error that final judgment is here for review (*Simpson* Record, pp. 16-22).



## Statement of Facts

The complaints state all the facts which are to be considered and they specially set up and raise the federal questions relied upon. An outline of these facts and the questions raised is next given, as presented in each case.

As each complaint raises the question of the constitutionality of the Oregon Minimum Wage Statute (Chap. 62, Ore. Stat. 1913, see Appendix II), in connection with the same orders and proceedings under that Statute, a summary of the essential provisions of that Statute is next given.

### SUMMARY OF OREGON MINIMUM WAGE STATUTE AND PROCEEDINGS UNDER IT

After the title and whereas clause asserting that the purpose of the Statute is to protect the "health and morals of women and minor workers," it provides:

"Section 1. It shall be unlawful to employ women or minors in any occupation within the State of Oregon for unreasonably long hours; and it shall be unlawful to employ women or minors in any occupation within the State of Oregon under such surroundings or conditions—sanitary or otherwise—as may be detrimental to their health or morals; and *it shall be unlawful to employ women in any occupation within the State of Oregon for wages which are inadequate to supply the necessary cost of living and to maintain them in health*; and it shall be unlawful to employ minors in any occupation within the State of Oregon for unreasonably low wages."

Section 2 establishes and provides for the appointment of the members of the "Industrial Welfare Commission," composed of three members appointed by the Governor. Section 3 provides for the organization of that Commission. Section 4 provides:

"Section 4. Said Commission is hereby authorized and empowered to ascertain and declare, in the manner hereinafter provided, the following things: (a) Standards of

hours of employment for women or for minors and what are unreasonably long hours for women or for minors in any occupation within the State of Oregon; (b) Standards of conditions of labor for women or for minors in any occupation within the State of Oregon and what surroundings or conditions—sanitary or otherwise—are detrimental to the health or morals of women or of minors in any such occupation; (c) *Standards of minimum wages for women in any occupation within the State of Oregon and what wages are inadequate to supply the necessary cost of living to any such women workers and to maintain them in good health*; and (d) Standards of minimum wages for minors in any occupation within the State of Oregon and what wages are unreasonably low for any such minor workers.”

Sections 5, 6 and 7 give the Commission certain inquisitorial powers. Section 8 provides for the appointment by the Commission of a Conference to investigate and report and make recommendations as to women workers in any particular occupation, which conference is to be composed of nine members, and

“Such Conference shall, in its report, make recommendations on any or all of the following questions concerning the particular occupation under inquiry, to-wit: (a) Standards of hours of employment for women workers and what are unreasonably long hours of employment for women workers; (b) Standards of conditions of labor for women workers and what surroundings or conditions—sanitary or otherwise—are detrimental to the health or morals of women workers; (c) *Standards of minimum wages for women workers and what wages are inadequate to supply the necessary cost of living to women workers and maintain them in health*.”

Section 9 empowers the Commission to

“Make and render such an order as may be proper or necessary to adopt such recommendations and carry the same into effect and require all employers in the occupation affected thereby to observe and comply with such recommendations and said order. Said order shall become effective in sixty days after it is made and rendered and shall be in full force and effect on and after the sixtieth day following its making and rendition.”

And in the same section the preliminary penalty provision is as follows:

**"After said order becomes effective and while it is effective, it shall be unlawful for any employer to violate or disregard any of the terms or provisions of said order or to employ any woman worker in any occupation covered by said order for longer hours or under different surroundings or conditions or at lower wages than are authorized or permitted by said order."**

Section 10 provides for special licenses for defective and crippled women. Section 11 gives the Commission power to promulgate orders affecting minors, without intervention of a Conference. Section 12 is as follows:

**"Section 12. The word 'occupation' as used in this Act shall be so construed as to include any and every vocation and pursuit and trade and industry. Any Conference may make a separate inquiry into and report on any branch of any occupation; and said Commission may make a separate order affecting any branch of any occupation. Any Conference may make different recommendations and said Commission may make different orders for the same occupation in different localities in the State when, in the judgment of such Conference or said Commission, different conditions in different localities justify such different recommendations or different orders."**

Sections 13 to 15 impose duties of enforcement on the Commission and investigations for that purpose. Section 16 limits the right of appeal to questions of law. Sections 17 to 19 are the penalty clauses as follows:

**"Section 17. Any person who violates any of the foregoing provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars or by imprisonment in the county jail for not less than ten days nor more than three months or by both such fine and imprisonment in the discretion of the court."**

**Section 18. Any employer who discharges or in any other manner discriminates against any employee because such employee has testified, or is about to testify, or because such employer believes that said employee may testify, in**

any investigation or proceedings under or relative to this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars.

*Section 19. If any woman worker shall be paid by her employer less than the minimum wage to which she is entitled under or by virtue of an order of said Commission, she may recover in a civil action the full amount of her said minimum wage less any amount actually paid to her by said employer, together with such attorneys fees as may be allowed by the court; and any agreement by her to work for less than such minimum wage shall be no defense to such action."*

The defendants were appointed as Commissioners constituting the "Industrial Welfare Commission" and organized with Caroline J. Gleason, Secretary. That Commission appointed a Conference "on wages, hours and conditions of work in manufacturing establishments in Portland, in the State of Oregon," which Conference in July, 1913, made a report to said Commission recommending:

"1. The establishment of a standard minimum wage of \$8.64 per week for women workers in manufacturing establishments of Portland, any lesser amount being inadequate to supply the necessary cost of living to women workers and to maintain them in health.

2. That the daily hours of work be limited to nine (9) per day or fifty-four (54) hours a week.

3. That the length of the lunch period be not less than three-fourths of an hour."

Thereafter, on September 10th, 1913, the Commission adopted the recommendations of that Conference and entered an order, which order was as follows:

*"No person, firm, corporation or association owning or operating any manufacturing establishment in the City of Portland, Oregon, shall employ any woman in said establishment for more than nine hours a day or fifty-four hours a week; or fix, allow or permit for any woman employee in said establishment a noon lunch period of less than forty-five minutes in length; or employ any experienced, adult woman worker, paid by time rates of payment,*

*in said establishment at a weekly wage of less than \$8.64, any lesser amount being hereby declared inadequate to supply the necessary cost of living to such women factory workers, and to maintain them in good health."*

*Stettler Record, pp. 6-8; Simpson Record, pp. 6-8.*

With these facts common to the complaints in both cases, the further allegations of the complaint are respectively as follows:

#### COMPLAINT IN STETTLER CASE

The *Stettler* complaint alleges that plaintiff is a citizen of the United States and owns and operates in the city of Portland, a manufacturing establishment for the manufacture and sale of paper boxes, in the conduct of which business he employs experienced adult women for wages at agreed rates (*Stettler Record*, p. 5). That the Conference referred to was appointed to consider only the wages, hours, etc., in manufacturing establishments in Portland, and not elsewhere, and did not make any other investigation and that no Conference had been appointed and no order had been made by said Commission establishing a minimum wage or maximum hours other than the one in this case, except one as to mercantile establishments in Portland, in accordance with which an order had been made on September 22nd, 1913, although there are within the State of Oregon, both inside and outside the City of Portland, many manufacturing establishments and other industries wherein women are employed (*Stettler Record*, p. 8); that of the 42 adult, experienced women employed by plaintiff, some he pays more than \$8.64 per week and some he pays less, paying in each instance pursuant to agreement, but that if he is required to pay all not less than \$8.64 each per week, his expenses will be such as to change his business from a profitable one to a one conducted at a loss; that he will suffer by competition of manufacturers in other States and localities who pay less wages than fixed in the order of the Commission; and that if he is made sub-

ject to the Commission's order he will have to advance the price of his product so as to render it impossible for him to market the same as against prices at which other similar manufacturers sell who are not subject to such wage regulation (*Stettler Record*, pp. 48-9). That he cannot pay his women employees the minimum wage ordered without depriving him of all profits and therefore without the enforcement of the order constituting a confiscation of his property; further that he has expended a large amount of money and time in building up a business and good will, but if the order in question shall be enforced, he will be compelled to abandon his business without compensation or to conduct the same without profit or interest on his investment; that the lowest wage for women, not apprentices, in his factory is \$6 per week; that those who receive less than \$8.64 per week are incompetent to earn greater wages and that those receiving less, receive adequate compensation for services rendered and that none receive an unreasonably low wage; that many of his women employees receiving less than \$8.64 are receiving other sources of income and desire and expect only to make a portion of their support, and are capable of making only a portion of their support from their employment with plaintiff; and that if the order be enforced plaintiff will be restricted to the employment only of women capable of performing labor sufficient to earn the fixed minimum wage and that less competent employees will be prevented from laboring for plaintiff (*Stettler Record*, pp. 9-10). The complaint (p. 10) also states:

"That the said work in plaintiff's said factory is light and healthful and said women now employed as aforesaid who are earning less than \$8.64 per week are willing to work for the plaintiff at said labor for the wages now paid, and they do not nor do any of them earn any greater wages than they are paid as aforesaid, and the plaintiff cannot conduct said business with any profit to himself or make or earn an amount sufficient to compensate him for the capital invested therein and pay said less competent women \$8.64 per week or any greater sum or wages than he is now paying them, for plaintiff avers that said less competent em-

ployees are unable to earn said \$8.64 or any greater sum or wages than they are being paid as aforesaid."

The complaint specifically draws in question the constitutionality of the State Statute on the ground of its repugnance to the Federal Constitution, specifying the particular points which were passed upon by the State Supreme Court and which are here for review (*Stettler* Record, p. 9).

#### COMPLAINT IN SIMPSON CASE

In the *Simpson* case, in addition to the setting forth of the Oregon Statute, the organization of the Commission, the proceedings and orders under it, which are stated substantially the same as in the *Stettler* case, the complaint alleges:

That plaintiff is a woman over twenty-two years of age, a citizen of the United States, residing in Portland, Oregon; that the business of her employer, Stettler, is as stated in the *Stettler* complaint; that plaintiff is an adult woman, experienced in the work of Stettler's factory and is now and for over three and a half years has been employed by Stettler therein at such wages as from time to time have been agreed upon between her and Stettler, and that thereby she has been and is now earning her living, working therein nine hours per day for \$8 per week and is paid by time rates of payment (*Simpson* Record, pp. 5-6); that no orders fixing wages or hours have been made or attempted by said Commission excepting the two already specified as to any occupation in any calling, business or industry in said state, either in the City of Portland or otherwise, although there are numerous manufacturing establishments and other industries in said state, both within and outside of the said City of Portland wherein women are employed by time rates of payment at a weekly wage of less than \$8.64 (*Simpson* Record, pp. 8-9). The complaint (p. 9) then alleges:

"That the wages which this plaintiff is receiving as aforesaid, are the best wages and compensation for her labor



that she is able to receive for any employment or labor which she is capable of performing, and if said order shall be enforced the plaintiff will be deprived of her said employment and wages. That plaintiff has no other trade or occupation, and has no means of earning her living other than by the pursuit of her said occupation in said, or in a similar, manufacturing establishment. That the work in said manufacturing establishment in which plaintiff is engaged is light and healthful, and said establishment and the place where she is employed is clean and healthful and the moral atmosphere, surroundings and conditions where she is employed are good. That by said employment plaintiff lives and maintains herself in health and comfort.

That plaintiff is employed in said establishment at the wages which she is being paid as aforesaid, pursuant to an agreement between the plaintiff and the said Stettler."

The *Simpson* complaint further alleges that unless restrained the Commission will threaten and will prosecute Stettler, her employer, and that by reason thereof she will lose her said employment and be deprived thereof and of her means of earning a living; whereas, if said Statute and order of the Commission are not enforced, she will be retained in said employment at her present wages, which she is desirous of doing, and will be able to continue to earn her living if permitted to do so (*Simpson* Record, pp. 9-10).

The *Simpson* complaint also draws in question the validity of the State Statute on the ground of its repugnance to the Federal Constitution and specifies the points of such repugnance as applied in this case, which points were considered and passed upon by the State Supreme Court and are here for review (*Simpson* Record, p. 10).

#### DECISIONS HEREIN OF THE STATE SUPREME COURT

The decision of the State Supreme Court in the *Simpson* case was based upon the assumed validity of the decision, and the reasoning thereof, in the *Stettler* case. These decisions are printed in full in the appendix hereto (Appendix, III and IV).

*It has already appeared that the crucial point in these cases, and the point to which the complaints are directed, is the point that the establishment of a general, compulsory statutory minimum wage in private employment, based and computed solely upon the individual needs of the employee, the basis and computation of which do not depend upon anything connected with or arising from the particular occupation in question, is unwarranted by any proper construction of the police power of the State.*

There is here in essence no direct question of the regulation of hours, except as the fixing of the maximum hours at the same time that the minimum wage is fixed becomes an element of the fixing of the minimum wage.

Neither is there here any direct question of the fixing of the lunch hour, except as it affects the minimum wage.

So far as the record shows, each of the Plaintiffs in Error would have no complaint if the operation of the Statute in question had been confined to an order of the Commission fixing the maximum hours and the lunch hour as under the orders here complained of.

The record shows that the hours now required by this employer are not in excess of those fixed by the order of the Commission in question. So far as the record shows the lunch hour is in practice already that which is required.

The question presented is that of the constitutionality of the minimum wage, as defined and attempted to be enforced under the Statute in question.

This was the only question presented to, or decided by, the State Supreme Court.

The question of the reasonableness or of the adequacy of the particular minimum wage here in question, \$8.64 per week computed by time, is neither directly nor indirectly in the case. While the complaints allege that, where less than the minimum so fixed is paid, such lesser wages are reasonable and adequate to furnish health and comfort to the employee, neither the

question of reasonableness nor adequacy were raised in the State courts and are not raised here, and they were not considered or passed upon by the State Supreme Court in either of the decisions in these cases.

The question heretofore raised and the only question now raised, is the constitutionality of this proposed extension of the police power of the State beyond the limits which have heretofore been set, and beyond the limits which heretofore it has ever been attempted to pass.

Note the respective decisions:

### *Stettler Decision*

The decision in the *Stettler* case is shown (pp. 14-25, *Stettler Record*, Appendix hereto, III). The discussion in that decision of the regulation of hours and the fixing of maximum hours under the police power of the State is not directed to the order of the Oregon Commission, nor to the provisions of the Oregon Statute, fixing maximum hours or fixing lunch hours. All these observations by the State Court in its decision are merely preliminary to the discussion of the question presented, that is of the minimum wage, and are for the purpose of attempting to draw, by analogy, conclusions with reference to the minimum wage question. At the outset of the decision, the Oregon Supreme Court states that the case presents questions "practically new in the courts of this county." Then, after reviewing the cases which have upheld minimum wages in public employment and maximum hours in occupations and under circumstances where, to the class of employees affected, a greater number of hours might reasonably be found to be detrimental, the court reaches the real and the only question before them—the constitutionality of this compulsory legislative minimum wage in private employment. The court then (*Stettler Record*, p. 19) says:

"There is only one federal inhibition urged against this

statute, namely: 'No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction an equal protection of law.' Fourteenth amendment. It may probably be conceded that the public welfare statute in question here violates this clause as abridging privileges of citizens if it can not be justified as a police measure; and we will assume, without entering into a discussion of that question or citation of authorities, that provisions enacted by the state under its police power that have for their purpose the protection or betterment of the public health, morals, peace and welfare, and reasonably tend to that end, are within the power of the state notwithstanding they may apparently conflict with the Fourteenth Amendment of the federal constitution."

Then, after comparing former regulations of hours and wages in public employment and former regulation of hours in private employment, and especially as applied to women employees, the Oregon State Supreme Court states its general conclusion upon the question which confronts them in this case in the following words (*Stettler* Record, p. 22, Appendix, III, p. 145).

"Every argument put forward to sustain the maximum hours law or upon which it was established applies equally in favor of the constitutionality of the minimum wage law as also within the police power of the state and as a regulation tending to guard the public morals and the public health."

Having come to such a conclusion, stated in general terms, the court then proceeds, on the basis of that general conclusion, to deny each of the specifications of unconstitutionality presented by the Plaintiffs in Error. Admitting that the effect of the Oregon Statute and the order of the Commission, if enforced, would be to abridge the privileges and immunities of the Plaintiff as a citizen of the United States and that it would deprive the Plaintiff of his liberty and of his property without due process of law, and that it would deny to the Plaintiff equal protection of the laws—admitting all this, the court holds that

this minimum wage may be justified as a police measure. Indeed, after quoting the XIVth Amendment as expressing the federal inhibitions urged by the Plaintiffs in Error against this statutory minimum wage, the Oregon Supreme Court says: "It may probably be conceded that the public welfare statute in question here violates this clause as abridging privileges of citizens if it cannot be justified as a police measure"; and that such legislative provisions "are within the power of the State notwithstanding they may apparently conflict with the XIVth Amendment of the Federal Constitution" (*Stettler* Record, p. 19, Appendix III, p. 142).

On this basis the court sustains this minimum wage, as against the special claim of the Plaintiff in Error that its enforcement would infringe each inhibition of the XIVth Amendment, specifically stated by him in his complaint and specifically urged upon the court.

This leaves the only question in the *Stettler* case, for review by this court, the question of the constitutionality of the Statute in question, as applied to the minimum wage.

### *Simpson Decision*

The *Simpson* decision is based upon the decision in the *Stettler* case and on the assumption that that decision is in all respects correct. It then emphasizes the holding that the statutory minimum wage complained of is not, if enforced, an abridgment of "the privileges or immunities of citizens of the United States" and referring to the *Stettler* decision, it says (*Simpson* Record, p. 14), that "it was certainly intended by that opinion to express the conviction of this court that the Act in question violated no precept of the XIVth Amendment." The decision then denies all the contentions of the Plaintiff in Error wherein she, as employee, by her complaint and by her contention before that court, urged the repugnance of the statu-

tory minimum wage in question to every inhibition, specifically named, of the XIVth Amendment. The only question again in this case which was presented and which was decided, was the constitutionality of the minimum wage.

### **Assignments and Specifications of Error**

The Plaintiffs in Error, and each of them, allege that in the record, proceedings, decision and judgments of the Supreme Court of the State of Oregon, in these cases respectively, there is manifest error in this:

That the said court held the Statute of Oregon entitled "An Act to protect the lives and health and morals of women and minor workers, and to establish an Industrial Welfare Commission and define its powers and duties, and to provide for the fixing of minimum wages and maximum hours and standard conditions of labor for such workers, and to provide penalties for violation of this act," approved and filed in the office of the Secretary of State of Oregon, February 17, 1913, and known as Chapter 62 of the Laws of Oregon for the year 1913, in so far as it authorized a compulsory minimum wage of \$8.64 per week, or at any sum, for women employees in manufacturing establishments of Portland, including the factory of Plaintiff in Error Stettler, or in any manufacturing establishment in the State of Oregon, or in any occupation in said State, to be valid and not in conflict with the provisions of the Constitution of the United States; whereas the said Act, as the same is attempted to be enforced in these cases and particularly in establishing and enforcing a minimum wage as in these cases, was and is invalid and contrary to the provisions of the Constitution of the United States on each of the following grounds: (1) That the establishment of said minimum wage, or any minimum

wage, is contrary to Section 1 of Amendment XIV of the Constitution of the United States in that it abridges the privileges and immunities of these Plaintiffs in Error, and each of them, as citizens of the United States; (2) that the same is contrary to provisions of Section 1 of said Amendment XIV, in that it deprives said Plaintiffs in Error and each of them of their property and liberty without due process of law; (3) that the same is contrary to provisions of Section 1 of said Amendment XIV, in that it denies said Plaintiffs in Error and each of them, the equal protection of the laws.

For further specification of errors to be relied upon under said assignments, the following are herein urged:

There was error in this, to-wit:

*The establishment and enforcement of a minimum wage, compulsory upon employers in private employment, such as is here attempted to be enforced, being based and computed upon the needs of a person, not as employee but as an individual, needs which are independent of the employment in question and independent of any employment, is not within the police power of the State, whether or not intended to be, or in fact, a measure protective of public welfare or of the lives, health or morals of women in general or of the women affected thereby. Therefore, if the enforcement of such minimum wage has the effect to infringe the rights, or any of the rights safeguarded by the XIVth Amendment against State legislation, to the damage of these Plaintiffs in Error, or either of them, or to the damage of other employers or employees similarly situated, the said Act, as to its minimum wage provisions, is invalid on the ground of its repugnance to the Federal Constitution.*

Applying the foregoing general statement, each of the following specifications of error is made:

1. The Plaintiff in Error, Stettler, has an established business with a good will built up at great expense, employing women at various wages from \$6 a week up, paying each accord-



ing to agreement, and paying in each case all that is reasonable or adequate in view of the quality and quantity of work done. The enforcement of this minimum wage against him will make him pay more than a reasonable or adequate wage, more than the work is worth to him, and thereby will destroy his profits and compel him to go out of business, thereby losing his investment and damaging him in other ways financially. The effect is to confiscate his property, his profits and his business, for the benefit of other individuals, or for a general public benefit, in so far as such benefits shall result. The Act therefore, has the effect to deprive him of his property without due process of law, contrary to the provisions of the XIVth Amendment.

For the same reasons the Act has the effect to deprive the Plaintiff in Error, Simpson, of the benefits of her employment, and therefore deprives her of her property without due process of law, contrary to the provisions of the XIVth Amendment.

2. The Plaintiff in Error, Simpson, is paid all that she earns, although less than the fixed minimum wage. It is the only work that she is fitted to do and in which she can earn as much as she does now, although less than the minimum wage. She and other women employees of the Plaintiff in Error, Stettler, are working under agreements for wages, which, though less than the minimum wage, are reasonable and adequate for the quality and quantity of work done. Such contracts of employment are reasonable and satisfactory. There is nothing connected with or arising out of the employment in question which either directly or indirectly increases the need, that is, the individual need, which the minimum wage fixed is intended to supply. The enforcement of the proposed minimum wage, with its penalties, nullifies further similar contracts of employment and makes the enforcement of such contracts, even with the consent of the employee, a misdemeanor on the part of the employer. The Act, therefore, deprives both the Plaintiffs in Error, Stettler, as employer, and Simpson as employee, of their

liberty of contract, contrary to the provisions of the XIVth Amendment.

3. The minimum wage imposed applies to Plaintiff in Error, Stettler, as a manufacturer of the City of Portland. It does not apply to other occupations, either in the City of Portland or elsewhere. It does not apply to manufacturers outside the city of Portland, whether within the State of Oregon or outside the State of Oregon. This discrimination against this Plaintiff in Error, in thus applying this minimum wage, is not only destructive of his business and creative of artificial competition against him in his own business, but it creates an arbitrary distinction against him and makes him one of a special class under an arbitrary and unjustified classification; and thereby, as well as for other reasons herein appearing, are abridged his privileges and immunities as a citizen of the United States and he is denied the equal protection of the laws, contrary to the provisions of the XIVth Amendment.

The Plaintiff in Error, Simpson, is not only unreasonably deprived of the liberty of contract and of her property rights, but she is discriminated against as one of an arbitrary class, for which classification there is no basis, especially so far as this minimum wage is concerned; and thereby, as well as for other reasons appearing, there are also abridged her privileges and immunities as a citizen of the United States and she is denied the equal protection of the laws, contrary to the Provisions of the XIVth Amendment.

4. The Plaintiff in Error, Stettler, if the minimum wage provisions of said State Statute are enforced, will be compelled to contribute to the private and individual needs of other persons in various sums, at various times, whereby said State Statute will have the effect to take the property of said Stettler for a private purpose without compensation. If said forced contributions to the individual needs of other persons are enforced for the public welfare of the community and in behalf of the

public, then the said State Statute will have the effect to take the private property of said Stettler for a public use and without compensation. Such taking of private property without compensation is prohibited by Section 18, Article I, of the Oregon State Constitution. The enforcement, therefore, of such contributions would be the enforcement of a State Statute whereby said Plaintiff in Error would be deprived of his property without due process of law, contrary to the XIVth Amendment of the Federal Constitution.

5. The said Oregon Statute authorizes a minimum wage, based upon individual and personal needs of the employee and applies to women adults, and to minors who are either men or women. The basis of fixing the minimum wage and computing its amount, is, in all cases, the living necessities of the individual, existing independently of the fact whether such individual be a man or a woman and independently of the fact whether such individual be a minor or an adult woman, also independently of the fact of employment. The basis of computation, therefore, is independent of the classification of persons to whom the Statute applies and is not based even upon the distinction between men and women; whereby the Statute, if enforced, has the effect to discriminate against the Plaintiff in Error, Stettler, in respect of the individuals to the personal needs of whom he is thus compelled to contribute, and thereby he is deprived of his privileges and immunities as a citizen of the United States and is denied the equal protection of the laws, contrary to Section 20, Article I, of the Oregon Constitution, and contrary to the XIVth Amendment of the Federal Constitution.

This statute, thus applying to both men and women, and applying to all women, whether adult or minor, and to all men minors, and excluding all other men, creates an arbitrary classification for the individuals entitled to the minimum wage, but fixes the computation of the amount of the minimum wage, on

a basis which is independent of such classification, that is upon the basis of the individual needs of the persons affected, excluding from its operation other persons equally affected by the same needs, that is, the funds necessary to furnish them the cost of living and to maintain them in health; and Plaintiff in Error, Simpson, is thereby discriminated against and is deprived of her property and liberty of contract as one of an arbitrary and discriminating classification; whereby, the said State Statute has the effect to deprive her of her privileges and immunities as a citizen of the United States and to deny her the equal protection of the laws, contrary to Section 20, Article I, of the Oregon Constitution and contrary to the XIVth Amendment of the Federal Constitution.

Wherefore, said Plaintiffs in Error, and each of them, pray that the said judgments, and each of them, of the Supreme Court of the State of Oregon be reversed and annulled, and that the said Act of the State of Oregon be declared void and unconstitutional in so far as it authorizes the enforcement of the minimum wage here in question, against the contentions of the Plaintiffs in Error, and each of them.

## ARGUMENT

### I

#### Federal Question Involved

From the Statement of the Case and from the Statement of the Facts, including the Summary of the Decisions of the Oregon State Supreme Court, which have just been presented, it is manifest that there has been only one question in these cases, and that that question is the only one which remains for this court; and that this question is a purely federal question.

This question is:

*Is it within the police power of the State to enact and enforce a legislative, compulsory minimum wage for private employment?*

This new species of paternalistic legislation cannot be sustained as applied to women workers, unless a similar minimum wage is to be sustained as to men workers.

The principle here involved has a basis more fundamental and more far-reaching than any distinction between women and men.

The question here is not of the fixing of hours or of wages in public employment.

The question here is not of fixing of hours or of working conditions in private employment, for the purpose of protecting the employee, man or woman, against the hazards or needs arising out of or in connection with the employments to which the regulation applies.

The question here is not one of the protection of women against dangers to their health or morals from excessive hours, arising either out of employments in which a greater number of hours would be or might be dangerous, or out of employments irrespective of their nature.

The question here is, in essence, whether the legislative arm of the State Government is to reach out its hand and lay hold of every private industry and of every mercantile and commercial business and arbitrarily and artificially control prices, not only of labor, but of the products of labor, including the prices of any or all articles of commerce, whether marketed at wholesale or at retail.

The question is: Shall competition in the business and commercial world be hampered and controlled by the arbitrary interference of State Legislation through legislative control of the prices, not only of labor, but of all subjects of commerce? Is legislative control to be extended to every detail of the conduct of private enterprise, industrial and commercial?

It is the contention of the Plaintiffs in Error that this proposed extension of the police power of the State is not only not warranted by any judicial precedent, but that it is contrary to every principle heretofore established as defining the limits and scope of the police power of a State.

It is further the contention of Plaintiffs in Error that, in addition to the reasons based upon judicial precedent, such a statute is contrary to public policy, because, for economic reasons, it is destructive of both the interests of employers and the interests of employees.

It is also the contention of these Plaintiffs in Error that the proposed extension of the police power of the State to the fixing of a minimum wage in private employment is not demanded by public opinion, but that on the contrary, the preponderant opinion of the intelligent mass of American people is against a legislative, compulsory minimum wage in private employment.

These contentions will next be taken up in the order mentioned; and, first, the contention that, in view of the established constitutional limits of the police power of a State, the compulsory, statutory minimum wage in private employment is repugnant to the XIVth Amendment of the Federal Constitution.

## II

**A Legislative, Compulsory Minimum Wage in Private Employment is not within the Police Power of a State to Enact and is therefore Repugnant to the XIVth Amendment of the Federal Constitution**

It should be kept in mind that this Statute provides for a minimum wage "in any occupation in the State of Oregon;" also that the Statute fixes the basis of computing the amount of the minimum wage on the individual needs of the employee, that is, on the amount necessary to supply the employee the cost of living, and to maintain health (See Sec. 1, Ore. Stat.; also Sec. 4, powers of Commission; also Sec. 8, duties of Conference). The recommendations of the Conference in this case and the order of the Commission based thereon, state that the particular minimum wage herein fixed was based on the amount necessary to supply the cost of living and to maintain in health the employees affected (See Complaint, *Stettler* Record, pp. 6-8; *Simpson* Record, pp. 7-8).

The theory upon which the Oregon statute is based, as a constitutional question, is shown by the following propositions which will be urged by those arguing in its support:

(1) While the statute has the effect to limit the right of contract in private employment, also to compel an employer, so long as he retains certain employees on his pay roll, to pay them in excess of what they earn, and thereby compels the employer to contribute to the sustenance of the employee without regard to consideration, and although it has the effect to discriminate between the employer affected and other employers within or without the state who are in the same class,—yet neither for this or for other reasons is the statute necessarily repugnant to the constitutional prohibition against statutes having such effects, because it is a statute the prime object and effect of which are to protect and safeguard the general public welfare, in that it promotes the general health and morals of its citizens and particularly of that class of citizens to whom



it applies, and therefore it is justified as a proper exercise of the police power of the State.

(2) That the statute has the same basis of constitutionality as statutes which have been sustained, regulating certain rules between employer and employee, including those compelling healthful and safe conditions and instrumentalities for work; those restricting hours of labor and even a minimum wage for employees engaged in public employment or in public work; those limiting the hours in private employment in occupations in their nature peculiarly and necessarily unhealthful or hazardous; and also those providing employment restrictions peculiarly necessary, in the instances in which the statutes are applicable, to the protection of women or minors, as such, and as distinguished from the less stringent restrictions assumed to be necessary for the protection of men adult employees.

(3) For the reason that the police power has been sustained as the basis for certain statutory regulations, applicable to certain cases of employment in favor of women, as such, and in favor of minors, as such, which presumably, under the decisions, could not be applied to adult male employees; therefore, any statute regulative of employment of women, or of women and minors, if only its purpose be made ostensibly to appear as one to preserve or promote the morals and health of the intended beneficiaries of the act, must be sustained as within the police power of the state.

(4) The Oregon minimum wage statute, applying to women and minor employees, *engaged in any occupation*, is just such a statute as is described in the last premise. It is, therefore, within the police power, no matter that it restricts the liberty of contract, takes the property of one for the benefit of another, and has many effects which, otherwise than for the paramount nature of the police power, would make it repugnant to the well known constitutional limitations prohibiting statutes depriving citizens of their liberty or property without the process of law, discriminating between citizens of the same class, unduly delegating legislative power, and other limitations safeguarding well recognized individual personal and property rights.

Any argument in favor of the constitutionality of this statute, however expressed, will, when analyzed, resolve itself into an attempt to support the propositions of law as above expressed. Indeed, the decision of the Oregon Supreme Court in these cases expressly bases its decision upholding this Mini-

imum Wage Statute upon an argument similar to that just outlined, and the gist of its decision is contained in these words:

“Every argument put forward to sustain the maximum hours law or upon which it was established applies equally in favor of the constitutionality of the minimum wage law as also within the police power of the state and as a regulation tending to guard the public morals and the public health.”

*Stettler Record*, p. 22.

It requires only a cursory examination of the authorities to disclose the fallacy of that argument.

With the exception of the decisions in these cases, there has been no decision of any appellate court, federal or state, sustaining a statutory compulsory minimum wage for either men or women or minors in any private employment, and no inferior court, federal or state, has sustained such a measure.

In order further to direct attention to the precise questions here involved, and to show the fact that the very distinctions made in the decisions of the highest courts in cases of other statutory regulations in labor matters point very clearly to the conclusions herein reached, we shall next show that certain decisions and classes of decisions which are cited in support of a statutory minimum wage for employees in private employment, not only do not support such a minimum wage, but are conclusive against it.

Such decisions are those (1) upholding statutory hours or wages for employees engaged *in public work*; and (2) next, decisions upholding statutory hours for employees engaged in *exceptionally unhealthy or hazardous occupations*, and then (3) decisions extending the police power of statutory protection to women beyond the limits established for men, and showing the grounds of the distinction in favor of women and *the limits within which such distinction is permissible*. Such examination will show that the statutory limits of regulation of employment of women under the police power are so established as to prohibit the statutory minimum wage for women and minors as provided by the Oregon act of 1913.

In other words, it will be shown that the decisions cited in support of this minimum wage not only do not support it, but on the contrary are against it. To this showing will be added decisions directly adjudicating that such statutory minimum wage for private employment is unconstitutional.

#### DECISIONS AS TO EMPLOYEES ENGAGED IN PUBLIC WORK

A Kansas statute regulating the employment of all laborers, in any public work, to an eight hour day, was upheld by the United States Supreme Court, without reference to the question of police power, on the ground that the State had the power to prescribe the conditions upon which it, the State, or any of its municipal divisions, which are a part of the State, should enter into contracts for labor. As said by Justice Harlan, who wrote the decision :

“Whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work *for it or for one of its municipal agencies*, should permit or require an employee on such work to labor in excess of eight hours each day, and inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit *public work* to be done on its behalf, or on behalf of its municipalities.”

*Atkin v. Kansas*, 191 U. S. 207, 222.

The court, in the same decision, expressly holds (page 218) that the question of police power, touching the regulation of hours in private employment in hazardous occupations, such as was discussed in the case of *Holden v. Hardy*, 169 U. S. 366,

was not involved for the reason, as shown by the quotation just given, that the work was public work.

What is more significant, the Court says:

“No question arises here as to the power of a State, consistently with the federal constitution, to make it a criminal offense for an employer in *purely private work* in which the public has no concern, to permit or to require his employees to perform daily labor in excess of a prescribed number of hours.”

Then distinguishing the case of *Holden v. Hardy*, in which the limitation of hours for laborers in underground mines and smelters to eight hours, was supported on the ground of the exceptional hazards of the employment, the Court said:

“As already stated, no such question is presented by the present record; for, the work to which the complaint refers is that performed on behalf of a municipal corporation, *not private work for private parties*. Whether a similar statute, applied to laborers or employees in purely private work would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider.”

*Atkin v. Kansas*, 191 U. S. 207, 218-219.

This decision established the principle that statutory regulation of hours, or even of wages or any other condition, as applied to contracts or employment *for public work*, does not present the question of police power; that such a statute is within the power of the State, on the ground of public policy, which leaves to the State the power to control the conditions of contracts to which it or its municipal subdivisions shall be a party for the purpose of its own public work.

This authority is recognized in a recent Washington decision where a state statute not only regulated hours, but fixed a minimum wage for employers engaged in public work. It was upheld by the Supreme Court of Washington on a second hearing, on authority of the reasoning and conclusion in the case of *Atkin v. Kansas*.

*Malette v. City of Spokane*, 77 Wash. 205.

Cases, therefore, decided on the ground that the work involved is *public work*, not only do not apply, but they clearly make a distinction as against cases of private employment and indicate that any general statute regulating hours or wages in private employment must, as to the classes of labor to which they apply, be based upon distinctions clearly sufficient to bring them within the police power of the state.

This leads to the distinctions made with reference to private employment.

#### DECISIONS AS TO HOURS IN EXCEPTIONALLY UNHEALTHFUL OR HAZARDOUS OCCUPATIONS

It has never been held that, as to men or as to women, statutory restrictions of hours could be enforced, except as to employment in such exceptionally unhealthy or hazardous occupations that the peculiar hazard to health, life or limb of those occupations justified the statute as a police power regulation of the health or safety of the employees embraced in the act.

On this principle it has been decided in many cases, which holding has been supported by the United States Supreme Court, that hours of labor might be limited in private employment in underground mines, smelters, etc. A statute of Utah made such limitation at eight hours, and in upholding that statute as a proper exercise of the police power, the United States Supreme Court said :

“The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. *These employments*, when too long pursued, the Legislature has judged to be *detrimental* to the health of employees, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal court. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more

than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight and is frequently subjected to foul atmosphere and a very high temperature or to the influence of noxious gases, generated by the process of refining or smelting."

*Holden v. Hardy*, 169 U. S. 366.

By this decision, there was expressly excluded the power, though ostensibly based on the police power of the State to protect health and morals, to enact any regulation of private employment and have it applied to any particular occupation, unless *from the peculiar nature of that occupation itself*, there could be reasonably said to be presented some peculiar hazard to the health or welfare of the employees in question. That question of fact must be determined by a consideration, first, of the nature of the occupation in question; and, second, the nature of the condition of the employees in question, as connected with the particular occupation in question. Neither of these elements alone is sufficiently determinant. The police power cannot be exercised solely because the class of employees in question is composed of men or of women or of minors, either or all. Neither can it be exercised solely because the occupation in question is of one kind or another, either hazardous or non-hazardous.

*The exercise of the police power in such cases is to be determined by the nature and extent of the peculiar hazards to health or safety arising out of the connection between the particular class of employees in question with the particular occupation in question.*

*If, from such connection, standing by itself and independent of other causes or conditions, there does not arise peculiar conditions menacing the health, comfort and safety of the employees, then there is no ground for the exercise of the police power with respect to such occupation.*

Without going further, then, it is manifest that even if it

be established that a certain employer in a certain occupation does not pay a certain employee or a certain class of employees a living wage, by reason of which fact the health, comfort or even morals of the employee is menaced, nevertheless the requisite ground for the interference of the State through its police power is not present. The needs of the employee are absolutely independent of anything that is related to the occupation in question. They are neither created nor increased by reason of any action on the part of the employer or through anything which is peculiar to the particular occupation in question. This is as far as we would need to go. *For the fact remains that neither the lack nor the need of a living wage is peculiar to any particular class of persons, nor to any particular class of employees, whether the class distinction be made on the basis of age, of sex, or of experience. That necessity is individual. It is neither created nor increased by the fact that the individual suffering from that common need, that natural need, happens to engage himself in a particular occupation as an employee.*

There is no ground for the distinction attempted in this minimum wage statute, though confined to women, which warrants its support as a police power measure in furtherance of health and morals.

We are stating these fundamental propositions now because they are suggested by the decisions already cited, and they will be illustrated and confirmed by the decisions which we shall next cite.

#### NEW YORK BAKERY SHOP CASE

(*Lochner v. N. Y.*, 198 U. S. 45.)

The Legislature of New York passed a statute limiting the hours of employment in bakeries to ten hours a day. This applied to employees of both sexes. The United States Supreme



Court held that act void as not within the police power of the State, and the Court said:

*"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.*

*"This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? And that question must be answered by the court.*

*"The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed*

in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and that the interests of the public are not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours per week. The limitation of the hours of labor does not come within the police power on that ground.

"It is a question of which of two powers or rights shall prevail,—the power of the state to legislate, or the right of the individual to liberty of person and freedom of contract.

*"The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid, which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.*

"This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the court dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the state, the Court of Appeals has upheld the act as one relating to the public health,—in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

"We think the limit of the police power has been reached and passed in this case. *There is, in our judgment, no rea-*

sonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, *there would seem to be no length to which legislation of this nature might not go*. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as stated in *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383, and *Jacobson v. Massachusetts*, 197 U. S. ante, 643, 25 Sup. Ct. Rep. 358.

"We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness.

"But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. *No trade, no occupation, no mode of earning one's living could escape this all-pervading power*, and the acts of the legislature in limiting

the hours of labor in all employments would be valid, *although such limitation might seriously cripple the ability of the laborer to support himself and his family.* In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers and other employees. Upon the assumption of the validity of this act under review it is not possible to say that an act, prohibiting lawyers or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is, therefore, unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the health of the employee condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts."

*Lochner v. New York*, 198 U. S. 45, 56.

This decision has been vigorously attacked, and it is even asserted that the dissenting opinion in this case "is the law in this country today."

*Report Mass. Com. Minimum Wage Boards*, 1912, p. 24.

But the dissenting opinion in that case did not support or urge any principle which could be the foundation for a statutory minimum wage in private employment. It was based upon the proposition that, as the Legislature of New York had declared that the *bakery industry was peculiarly dangerous to the health of employees*, the contrary fact was not so well established and well known that an appellate court could say of its own motion that the finding of the Legislature was wrong upon this question of fact, nor that the state appellate court was

wrong in refusing to reverse the state legislature as to that finding of fact.

*Lochner v. New York*, 198 U. S. 45, dissenting opinion, 65-74.

But in this decision there is emphasized the principle which we have above stated as controlling the consideration of the constitutionality of this minimum wage statute, and our present contention is supported even more by the dissenting opinion than by the main opinion. Taken together, they form a complete confirmation of our proposition, and a complete answer to the claim of constitutionality of this minimum wage statute. *They clearly establish the rule that in these matters the hazard to safety, health or comfort of the employee which may be protected by the statutory regulation must be a hazard peculiar to the occupation in question.*

A statutory restriction, even as to hours of labor, in which the occupation bore no relation to the safety, health or morals of the employee, could have no validity based upon the police power of the state. Yet this minimum wage statute applies to any occupation and to each and all occupations, businesses and industries, and to every branch thereof, without any reference to or consideration of any peculiarity of any such occupation, much less of any peculiarity with reference to its being hazardous to safety, health or morals. Accordingly, a regulation of hours made in the broad terms of this statute could not be justified; much less a regulation of wages, computed by the living needs of the employee, which are not even remotely connected with, but are absolutely divorced from, anything arising out of the occupation itself.

There is no "real or substantial relation" between the employments affected by such a statute and the objects which it purports to accomplish. In other words, there is no real or substantial relation between the occupation of, for instance, the retail merchant and the natural necessity or the natural desert

of an employee to receive a living wage, even though a living wage be necessary for the reasonable health and comfort of the employee. Even if we admit that it is the ethical or religious duty of an employer to supply this need, still there is no legal basis for compelling him to do so, merely because in some occupation he holds to the person in need the relation of employer to employee.

As has been said by the United States Supreme Court many times, and reiterated in the dissenting opinion in the *Lochner* case, a court should declare such statute invalid if it, though "purporting to have been enacted to protect the public health, the public morals or the public safety, *has no real, substantial relation* to those objects, or is, beyond all question, a plain, palpable invasion of the rights secured by the fundamental law."

*Lochner v. New York*, 198 U. S.; dissenting opinion, p. 68.

No statutory regulation of labor, whether as to labor conditions, hours or wages which involved a payment or charge upon the employer in favor of the employee, has ever been sustained, unless such charge has been to compensate the employee for or to relieve him from some hazard or disadvantage *arising directly out of the employment in question*. On this principle, hours may be restricted as to employees to whom in the occupation in question longer hours are unhealthy or dangerous. Safe and healthful conditions of work may be required, including safety appliances in machinery. Also, under workmen's compensation acts, casualty from accident in the employment may be insured against at the expense of the employer. It could never be seriously claimed, however, that an employer could be compelled to provide reasonably necessary sick benefits or death benefits for his employee or employee's family, on the ground that such misfortunes occurred directly or indirectly to the employee while employed,—meaning, of course, sickness and death of the employee or members of his family, which are not



results of contact with the employment. Nevertheless, such benefits would be promotive of the health and comfort of the employee and are included in the reasonable necessities of life. Such benefits cannot be imposed where their necessity does not originate from the employment itself. For the same reason, the minimum wage benefit is entirely different from other statutory benefits to employees, at the expense of the employer, which have been sustained by the courts. The fulfilling of the necessity in question is, as a general proposition, promotive of health, morals and comfort, but it is not a necessity which arises out of the employment, nor one which is connected with it. So far as considerations of legal obligations are concerned, the employer is a stranger to such necessities. Therefore, he cannot be compelled by law to pay a wage based solely upon the living necessities of the individual employed.

#### OREGON CASE—WOMEN IN LAUNDRIES

The case of *Muller v. Oregon*, 208 U. S. 412, is cited in support of this minimum wage statute for women employees, as establishing a right of the legislature, under the police power, to have enforced this legislation as to women employees, which, it is demonstrated, under the decisions already cited, could not be enforced as to adult male employees. It is claimed that this case establishes the right to place women as a class under the purview of statutes regulating hours and wages and other conditions; and that such restrictions may be made applicable to any and all occupations independently of the questions of any hazard to safety, health or morals peculiar to the occupation in question.

On the contrary, this Oregon case again confirms the proposition upon which our argument is based, that in order to warrant such restrictions, with reference to any occupation, on the ground of police power to protect against hazards to safety



or health or morals, the hazard in question must be shown to arise from the occupation in question, and in connection with the employment in question. More than that, a restriction as to hours might be justified as having "real, substantial relation" to the purposes of the statute. But a regulation requiring a living wage would have no relation whatever to the occupation or to the employment in question.

The Legislature of Oregon passed an act limiting the hours for work by females "in any mechanical establishment, or factory, or laundry in this state more than ten hours during any day." The question in this case was whether the prohibition as applicable to laundries could be enforced.

Now, from what has already been said, and before we proceed to examine the decision of the federal supreme court in this Oregon case, we can readily see that the principles which we have stated, as already drawn from the decisions above noted, would be confirmed or repudiated in the Oregon case according to whether the basis of that decision was one or the other of the following propositions:

(1) The occupation of laundry women, as laundries are generally conducted, involves such requirements of the employee that excessive hours would hazard the safety and health of the employee in question; and, furthermore, as the employees in question are women, the hazard involved is peculiarly dangerous to women; or

(2) Under the police power restrictions may be applied to women employees as a class, irrespective of the character of the occupation or kind of employment in which their work is done, and irrespective of the kind of work which the women employees in question have to do in that occupation, and also irrespective of whether or not the hazard to their safety, health and comfort, against which it is the object of the act to protect them (in the case of the minimum wage statute it is the abstract right to or need of living, and is not a question of hours) has, in the words of the Court, "any real or substantial relation" to the objects sought to be accomplished.

Now, a reading of that decision shows that it is based exactly upon the former proposition and that it squarely repudiates

the latter proposition. The case, therefore, not only fails to support the argument for the constitutionality of the minimum wage statute, but is directly against it.

The Court held that an occupation might be injurious to a woman employee when it was not to a man, and that, therefore, hours of more than ten a day for a woman might be prohibited, if the facts warranted, when such prohibition in the case of a man would not be sustained; and that this distinction, when reasonably made the basis of a statute, would be sustained.

Then, referring to the occupation in question, that of a woman worker in a laundry, requiring her day after day to be for a long time on her feet at work, it was held that the State Legislature was warranted in finding that there was as to women a peculiar hazard to health, if the hours were not restricted. This is the scope and limit of that decision. The Court said:

“That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, respecting this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offsprings, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

“Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing special care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed

by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.

“We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while that may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

“For these reasons, and without questioning in any respect the decision in *Lochner v. New York*, we are of the

opinion that it cannot be adjudged that the ~~act~~ in question is in conflict with the Federal Constitution, *so far as it respects the work of a female in a laundry*, and the judgment of the Supreme Court of Oregon is affirmed."

*Muller v. Oregon*, 208 U. S. 412, 421-23.

#### DISTINCTION BETWEEN (1) MAXIMUM HOURS FOR WOMEN AND (2) MINIMUM WAGES FOR WOMEN

It has, in fact, never been held by this court that, irrespective of the nature of the occupation to which the restriction applies, a restriction of maximum hours for women employees is within the police power.

The Statute upheld by this court in the case of *Muller v. Oregon*, limited hours for work by females "in any mechanical establishment or factory or laundry in this State more than ten hours during any day." The decision in that case was expressly based, as above shown, upon the facts (1) that work in laundries involved physical requirements such as "continuance for a long time on her feet at work," and (2) that woman's peculiar physical structure and her peculiar burdens and duties made such work tend "to injurious effects upon the body." From these facts this court concluded that "so far as it respects the work of a female in a laundry" the State Statute there in question must be sustained as a proper exercise of the police power.

That decision has been claimed as a support for the proposition that a state could constitutionally legislate maximum hours for any and all women in any and all employments. Such proposition has not been sustained by this court. The Statute of Massachusetts, discussed in the case of *Riley v. Massachusetts* (232 U. S. 671, 679), provided for a ten hour day for women employed "in any manufacturing or mechanical establishment." The precise question presented in that case was the constitutionality of the requirement that the employer should post a printed notice, stating the number of hours of work re-

quired of employees on each day of the week, and the hours of commencing and stopping work, etc. (p. 679). This provision was upheld as proper means to secure certainty in the observations of the law (p. 681). The maximum hour provision was not held constitutional, except as to the mechanical factories to which alone the Statute applied. The case of *Muller v. Oregon*, is cited by this court as a precedent, not for general maximum hour provisions for women, but for maximum hour provisions for women "in mechanical factories or laundries" (p. 679).

The Ohio Statute in question in the case of *Hawley v. Walker*, 232 U. S. 718, provided for maximum hours for adult females employed in "any factory, work shop, telephone or telegraph office, millinery or dressmaking establishments, restaurants, or in distributing or transmitting of messages" (Ohio Act of May 31, 1911). Indeed, the contention of the Defendant in Error in that case, as shown by the argument and conclusion in the brief of his counsel, was confined to urging the constitutionality of the hour regulation for women in the "enumerated employments." The judgment of the Supreme Court of the State of Ohio sustaining that Act as constitutional was affirmed by this court on the authority of *Muller v. Oregon* (see *Hawley v. Walker*, 232 U. S. 718).

Therefore, it has not been established by this court that it is within the police power of the State to legislate maximum hours for women as applied to all private occupations.

But even if such had been the holding of this court, or even if such is to be the holding of this court when the question shall arise, still such holding would not be authority for sustaining a compulsory minimum wage statute in private employment. The difference between the prevention of physically excessive hours, and the compulsory monetary contribution to the individual needs of the one employed, is so great that the constitutionality of the latter could not be based upon the constitutionality of the former. The former would be a regulation

to protect against the dangers which arise out of and are connected with the fact of employment and which arise out of and are connected with the employment itself and the methods by which such employment is conducted. Without the employment, the need or hazard or danger against which the Statute intends to protect, does not exist. The employment involves physical exactions, to the burdens of which the natural, physical endurance of woman are peculiarly susceptible; and, for the protection of womankind and, therefore, for the welfare of the community, any excessive physical requirements is prohibited. This is the theory, and the only theory, on which a general, maximum hour regulation as to women could be sustained.

But the enforcement of a minimum wage statute must have another and different basis. It cannot be based, and is not attempted to be based, upon any need, hazard or danger to the employee existing or arising in any way out of the fact of employment, or out of the employment itself. It is based upon a purely individual need of the person concerned and it is a need to such person which exists and continues just as much without employment as with employment. It is the natural, human, individual need of subsistence and of health. It is a need to which, except upon purely ethical considerations, the employer is a stranger. He may be paying all that the employee earns or is capable of earning. The employment in question may be merely incidental as a means of subsistence to the employee. She may have other and independent means of support. The record in this case shows that many of Stettler's employees, affected by this Statute, are of that class. The observance of the most altruistic rule of duty between one individual and another would under the circumstances probably require less than that which is compelled by this Statute. But the Statute makes no distinction on the basis of the circumstances of the different employees. It is not based and is not attempted to be based upon any ethical duty. It is based solely upon the rigid rule, which must be applied in every case without exception, that

the mere fact of employment creates a legal obligation upon the employer, with criminal and civil penalties for its non-observance, to furnish to every woman employee, as wages, an amount which is adequate to supply her with the necessary cost of living and to maintain her in health.

Such an obligation cannot be imposed through any reasonable construction or extension of the police power of the State. Such legislation is inconsistent with the rights of property and of liberty and of equality which are vouchsafed to the citizens of this constitutional democracy.

It means the establishment of the discretion of the respective legislatures of the States as paramount to the protective provisions of our Federal Constitution. If this new species of paternalistic legislation be sustained, it means the establishment of the arbitrary power of State legislatures, under the guise of the so-called police power, to circumvent constitutional prohibitions. It would constitute a return to the oppressive legislative interference in the conduct of business which characterized those discredited systems of government where regulation of prices and regulation of wages and regulation of all conditions of labor and of business were instituted and enforced, because there existed no enforceable bill of rights and no fundamental law standing in the way of legislative oppression.

#### **A STATUTORY MINIMUM WAGE IN PRIVATE EMPLOYMENT IS NOT WITHIN THE POLICE POWER**

The principal basis of our claim of the unconstitutionality of this Oregon minimum wage statute, as applied to these plaintiffs in error, is that it deprives them of the liberty of contract, and deprives them of their property rights, in repugnance to the XIVth Amendment. Our claim must be sustained, unless it is held that such legislation is within the police power of the State of Oregon.



We do not overlook the holdings of this court to the effect that "the right of contract is not absolute and unyielding, but is subject to limitation and restraint in the interest of the public health, safety, and welfare, and such limitations may be declared in legislation of the State." (See dissenting opinion in *Coppage v. Kansas*, 236 U. S. 1, 28). Nor have we overlooked the holdings of this court that, in instances where the police power is properly exercised for regulation, the result may be the taking of some of the property of the persons affected by the regulation.

Our claim here is, that in the case of this minimum wage statute, the limitations of the exercise of the police power have been exceeded; that the protection of the welfare, safety or comfort of the public, asserted as the purpose of this legislation, is only a guise or cloak, assumed for the sole purpose of infringing the prohibitions of the XIVth Amendment, under the pretext of exercising police power; and that the pretended basis of police power,—the general welfare, health or comfort of the public,—asserted in this legislation, has, in fact, no real connection or relation with the specific provisions fixing the minimum wage of employees in certain occupations.

The Oregon act, as are also all these statutory minimum wage acts, is in reality legislation only for the increased comfort, the *individual* comfort, of those particular persons, certain employees, who come within its purview. Those comforts which are so protected or increased, moreover, are the natural, individual needs of those persons affected, and are not in any way connected with or related to the occupations which are attempted to be regulated, nor to the fact of occupation. Again, the regulation here in question is not in fact a regulation of an occupation, nor does it purport to be a regulation of an occupation. It is merely a regulation of the personal relations between one who happens to be employer and one who happens to be employee. It is still more purely personal in its nature. It restricts the relation between potential employers and potential

employees; for it prevents a possible employee from making a contract which he might desire to make for labor at a price which he can command and is worth, and it prevents an employer from making a contract for labor at a price that he can afford to pay, or unless he pays more than is the worth of the employee.

The deprivation of property rights is also personal and does not arise from any proper regulation in the interests of the public welfare. For this statute says to the employer that, as a condition of carrying on his business, he must pay out to supply the personal individual needs of his employees more money, as the wage-cost of his industry, than is the fair market value thereof. As between a particular employer and a particular employee, the statute says that the employer must pay the fair market price of labor, *and something more*. This "something more" is measured arbitrarily, not as a regulation for the public welfare, but solely from what happens to be the individual need of the particular employee for living according to a certain standard, which standard, moreover, is fixed by the same statute.

There is no precedent, under our Federal Constitution, for this sort of exercise of the police power. Both in kind and in its specific application it is outside the proper limitations of police powers, and therefore becomes invalid as repugnant to the XIVth Amendment. If any constitutional right of a citizen has ever been established by decisions of this court, it is the right of every individual "to work for a living in the common occupations of the community."

In the case of *Truax v. Raich*, 239 U. S. 33, applying this principle to an Arizona statute limiting the number of aliens that an employer could employ, this court declared such restriction unconstitutional, and said:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.

*Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; *Barbier v. Connolly*, 113 U. S. 27, 31; *Yick Wo v. Hopkins*, *supra*; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590; *Coppage v. Kansas*, 236 U. S. 1, 14."

*Truax v. Raich*, 239 U. S. 33, 41.

In *Adair v. United States*, 208 U. S. 161, this court declared an Act of Congress unconstitutional which had prohibited any railway employer from discriminating against members of labor unions, and this court said (p. 174) :

"While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. *The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.* So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars *the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.*"

*Adair v. United States*, 208 U. S. 161, 174.

In *Coppage v. Kansas*, 236 U. S. 1, a Kansas statute prohibited an employer from making a private contract for labor based on the condition of the employee remaining a non-union man.

The statute was held unconstitutional as infringing the liberty of contract, and not due process of law, and in its decision this court discusses the rights of employers and employees in making contracts for labor. Referring to the decision in the *Adair* case this court says (pp. 13, 14) :

“The decision in that case was reached as the result of elaborate argument and full consideration. The opinion states (208 U. S. 171) : ‘This question is admittedly one of importance, and has been examined with care and deliberation. And the Court has reached a conclusion which, in its judgment, is consistent with both the words and spirit of the Constitution and is sustained as well by sound reason.’ We are now asked, in effect, to overrule it; and in view of the importance of the issue we have re-examined the question from the standpoint of both reason and authority. As a result, we are constrained to re-affirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to re-state some of the grounds upon which it rests. *The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.*

“An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power.”

*Coppage v. Kansas*, 236 U. S. 1, 13, 14.

In the same decision this court holds that the declaration on the face of the statute that it is for a certain public purpose (that it is a police-power regulation), does not itself make the

statute one of that kind, in the light of constitutional considerations (pp. 15, 16) :

“Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. ‘Its true character cannot be changed by its collocation,’ as Mr. Justice Grier said in the *Passenger Cases*, 7 How. 283, 458.”

*Coppage v. Kansas*, 236 U. S. 1, 15, 16.

And referring to the declaration of the act that it was for public health, safety, morals or general welfare, this court then proceeded to answer this question in the negative (pp. 16, 17) :

“What possible relation has the residue of the Act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any. The Act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.”

*Coppage v. Kansas*, 236 U. S. 1, 16, 17.

In the same decision this court disposes of one of the grounds urged as sustaining the minimum wage statute for women. It is here claimed that the statute is a valid exercise of the police power because it operates in favor of a class of labor which is *weak in bargaining-power*, and that, therefore, the State may step in and regulate any bargains for labor between that class and any employer. The same argument applies, of course, to all labor. The assumption is not justified that a woman is not as good a bargainer as a man. Stripped of all its verbiage and

pretensions, this statute is one wherein the State arbitrarily steps in between those possessing property in some considerable degree, and those without property, or not possessing the same to any great extent. Such statute is based upon the classification of all citizens as (1) "employers" on the one hand and (2) "employees" on the other. It is the injection into statutory form of the socialist discrimination between capital and labor.

But as said by this court "wherever the right of private property exists there must and will be inequalities of fortune"; but obviously it is not a proper exercise of the police power to legislate for the purpose of leveling the inequalities of fortune. Some employees attempt to remedy any weakness of bargaining-power on the part of labor by the maintenance of unions, through which collective-bargaining is, to a more or less limited degree, made possible. The legitimacy of such organized efforts depends, of course, upon the methods used. It may be admitted that collective-bargaining by labor would be advantageous to the working class. It may be admitted that collective selling would be advantageous to the manufacturing class. But neither of these facts would make legal or constitutional every system of enforcing either collective-bargaining by one class, or collective-selling by the other. In the same way collective-purchasing of labor by the employer class might be for the benefit of the employers. Yet in none of these instances does the fact that, without collective-bargaining, less income is derived by the class affected, in any degree demonstrate that the collective system would be for the general public welfare, or for the general public comfort. The fact is, that the price of labor, whether by women or by men, depends upon supply and demand. Varying under different conditions and localities, labor has its market value. The minimum wage statute steps in and attempts to fix an arbitrary price, under the guise of police regulation for the public welfare. Such legislation is, in fact, repugnant to the liberty of contract and to the right of prop-



erty, which, under our government, belongs to every individual, independently of the question of the amount of his fortune, or of the relative bargaining power of one class as against the other.

This argument of the advocates of the statutory minimum wage is answered by this court in the *Coppage* case, 236 U. S. 1, 17, as follows:

“No doubt, wherever the right of private property exists, there must and will be *inequalities of fortune*; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not ‘deprive any person of life, liberty or property without due process of law,’ gives to each of these an equal sanction; it recognizes ‘liberty’ and ‘property’ as co-existent human rights, and debars the States from any unwarranted interference with either.

“And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those *inequalities* that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty. \* \* \*

“An evident and controlling distinction is this: that in those cases it has been held permissible for the States



to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—*there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of levelling inequalities of fortune by depriving one who has property of some part of what is characterized as his financial independence.* In short, *an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare.* But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. *The mere restriction of liberty or of property rights cannot of itself be denominated ‘public welfare,’ and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.* \* \* \*

“And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not; and since the relation of employer and employee is a voluntary relation, as clearly as is that between the members of a labor organization, *the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance.*”

*Coppage v. Kansas*, 236 U. S. 1, 17-20.

The *dissenting opinion* in the same case does not militate at all against the application of the law which we here make. The dissenting opinion was based upon the ground that the statute in question in the *Coppage* case was enacted to prevent coercion in making contracts of employment, by preventing the employer from making it a condition of a labor contract that the employee should not exercise one of his rights as an American citizen, protected also by the Constitution,—that is, the right to be a member of a voluntary organization. The dissent-

ing opinion says (p. 40) :

“The penalty imposed is not for the discharge but for the attempt to coerce an unwilling employee to agree to forego the exercise of the legal right involved as a condition of employment. It is the requirement of such agreements which the State declares to be against public policy.”

*Coppage v. Kansas*, 236 U. S. 1, 40.

And the same dissenting opinion goes on to demonstrate that the statute would not be a valid police regulation if it were not one to *protect* the constitutional right of the employee, as a citizen under our Constitution, to be a member of a voluntary association; and that the statute would not be valid if it infringed the constitutional right of any citizen, whether employee or employer. These are the words (p. 40) :

“While this court should, within the limitations of the constitutional guaranty, protect the free right of contract, it is not less important that the State be given the right to exert its legislative authority, if it deems best to do so, for the protection of rights which inhere in the privileges of the citizen of every free country.”

*Coppage v. Kansas*, 236 U. S. 1, 40.

The minimum wage statute does not come within the definition, thus laid down by Mr. Justice Day, of the proper scope of a police regulation which has the effect to limit the freedom of contract. The minimum wage statute is for the purpose, and has precisely the effect, and only that effect,—to restrict the constitutional right of the freedom of contract. It is directed exactly to that point, and the restriction operates against both the employee and the employer. No matter what its recited purpose, its real and only purpose and effect is, not “the protection of rights which inhere in the privileges of the citizen of every free country,” but the infringement of those very rights. Of course, the “privileges” referred to in Justice Day’s opinion refer to the *constitutional privileges* of a citizen. The “protection” which the minimum wage statute avowedly attempts is to insure to certain citizens, so long as they are employees of some employer, an income which will meet their individual and

natural needs. Laying aside the economic objections to the minimum wage, we may admit for the purpose of argument that such a measure would be for that sort of "protection" of the employee class, or in this case, the female employee class. But there exist no constitutional right and no constitutional "privilege" in any citizens to receive from anybody, whether employer or not, an income adequate to his living in health, comfort, etc.

Therefore, the "protection" admitted to be vouchsafed by this statute is not one which warrants legislation infringing the constitutional liberty of contract and the property rights of both employee and employer.

The case of *Smith v. Texas*, 233 U. S. 630, also supports our contention. There was considered a statute limiting the class of men who could be selected as conductors of trains, including one class and excluding another class; members of both of which classes might be equally qualified. The statute was declared unconstitutional as infringing the liberty of contract and depriving citizens of their rights and privileges under the Constitution. This court said (p. 636):

"Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

"If the service is public the State may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. *Ex parte Lockwood*, 154 U. S. 116; *Hawker v. New York*, 170 U. S. 189; *Watson v. Maryland*, 218 U. S. 173. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the State may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But as the public inter-

est is the basis of such legislation, the tests and prohibition should be enacted with reference to that object and so as not unduly to 'interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' *Lawton v. Steel*, 152 U. S. 133, 137."

*Smith v. Texas*, 233 U. S. 630, 636.

And again (p. 638) :

"The liberty of contract is, of course, not unlimited ; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves."

*Smith v. Texas*, 233 U. S. 630, 638.

And again (p. 641) :

"So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer it—and the answer in no way denies the right of the State to require examinations to test the fitness and capacity of brakemen, firemen, engineers and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act—because he is presumptively competent—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen and operates to establish rules of promotion in a private employment."

*Smith v. Texas*, 233 U. S. 630, 641.

The case of *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, shows the limitations of statutory regulation of prices in private business. A Kansas statute had regulated the rates of fire insurance. This, then, was a price regulation as applied to a certain business, the business of fire insurance. *The statute was sustained by this court, but solely on the ground of the peculiarity of the fire insurance business, in that it was "affected with a public interest."* The difference between the majority opinion and the dissenting opinion in that case, was merely the difference in the view of the fire insurance business, the one viewing it as affected with a public interest to the extent that price regulation was within the police power, and the other viewing it as not affected with a public interest to the extent required for police power regulation; but both opinions sustain the contention which we here make as to the price regulation affecting any and all occupations in which women are employed, independently of any consideration of whether the business regulated is or is not "affected with a public interest." The court says (majority opinion, p. 406) :

"We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation."

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 406.

Then the opinion considers in detail the various businesses which have been held "affected with a public interest," and therefore subject to price regulation, and continues (p. 411) :

"The cases need no explanatory or fortifying comment.

They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People v. Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. 'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.' Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today. We proceed then to consider whether the business of insurance is within the principle."

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 411.

Then, examining the relations between the public and the fire insurance business as the same is conducted in this country, the court holds that there are many reasons why that business is affected with a general public interest. And the court expressly confines its decision, sustaining price regulation as an exercise of the police power, to "*the business of insurance*, it having become clothed with a public interest, and therefore, subject to be controlled by the public for the common good" (p. 15).

The *dissenting opinion* in the *German Alliance* case opposed the view of the majority opinion that the business of fire insurance was affected with a public interest to the extent of allowing price regulation under the police power. This opened up the discussion of the constitutionality of price regulation in private business, not affected with a public interest. *This brings the discussion in the dissenting opinion to the very point in issue in these minimum wage statutes*; and we assume that



as applied to private occupations not affected with a public interest the reasoning of the dissenting opinion would be heartily concurred in by those justices who join in the majority opinion. Therefore, we urge the discussion upon that point as direct authority of this court in favor of the point we here make as to the statutory minimum wage.

The following is from the dissenting opinion (p. 418) :

“The case does not deal with a statute affecting the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the State to fix the price of a strictly personal contract. \* \* \* The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum—that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use.”

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 418, 419.

And (pp. 420-422) :

“So that if the price of a private and personal contract of indemnity can be regulated—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated and the reasoning on which the court’s opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute. \* \* \*

“Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employe to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employe, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary



*power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individuals.* In time, the great injustice in this, was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for *public* wharfs, was able to say, in *Allnutt v. Inglis*, 12 East, 527, 538, 'that the general principle is favored both in law and justice, that every man may fix what price he pleases for his own property or the use of it.' But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the Colonies 'up to the time of independence,' yet, as Judge Cooley says, since independence '*it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty.*' Cooley's Const. Law (7th ed) 807; Stickney's State Control of Trade, p. 3 and the abstract of English price-fixing statutes, p. 9 et seq. That common supposition is rightly founded on the fact that the Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership. *State Tax Case*, 15 Wall. 232, 278, top."

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 420-422.

"For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. *Missouri Pacific v. Nebraska*, 164 U. S. 403. *That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution and which entitled the citizen freely to engage in any honest calling and to make contracts as buyer or seller, as employer or employee in order to support himself and family.*"

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 424.

And referring to the *Munn Case* (94 U. S. 113) regulating the price charged for storage of grain in elevators, the dissenting opinion says (p. 425) :

"The reasoning of the court clearly shows that in order to regulate rates, two things must concur—(1) the business must be affected with a public interest; and (2) the property employed in such business must be devoted to a public use. \* \* \*

"Not only does the *Munn Case* show that the right to fix prices depends on the concurrence of public interest and the employment of property devoted to a public use, but with the exception of the *Louisiana Bread Case*, 12 La. Ann. 432, it is believed that every American rate-statute since the requirement that property should not be taken without due process of law, related to a business which was public in its character and employed visible and tangible property which had been devoted to a public use."

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 425.

And again (p. 427) :

"But it is said that business is the fundamental thing and the property but an instrument, and that there is no basis for the distinction between a public interest and a public use. But there is a distinction between a public interest—justifying regulation—and a public use—justifying price-fixing. 'Public interest and public use are not synonymous.' "

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 427.

And again (p. 430) :

"In view of the amount of property employed and the aggregate number of persons engaged in agriculture and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn; cotton and wools; beef, pork, mutton and poultry, fruit and vegetables, could be fixed. Or if we take the aggregate of those who labor and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest and that wages in the United States of America in this Twentieth Century could be fixed by law, just as in England between the 14th and 18th centuries. And inasmuch as the

prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living."

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 430.

And referring to the liberty of contract in private business belonging to the employer and to the employee it was said (pp. 431, 432) :

"By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor. \* \* \* *Guillotte v. New Orleans*, 12 La. Ann. 432, is the only American case found which sustains the right to fix prices for other than a commodity or service furnished by a public utility company of the kind already pointed out. In that case the court said that the city could fix the price of bread and that if the baker did not desire to do business within the limits of such city he could go elsewhere. That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this court that such an answer cannot sustain an invalid statute, the Constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation."

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 431, 432.

Thus both the majority and minority opinions in the *German Alliance Case* support the contention which we make here, to-wit: That in a private occupation the price of labor cannot be fixed by statute.

The case of *Miller v. Wilson*, 236 U. S. 373, and *Bosley v. McLaughlin*, 236 U. S. 385, are sometimes cited in support of the contention that minimum wage statutes applicable to women should be sustained as a protection to women as a class, differing from men in their physical make-up and ability to sustain burdens, and in their peculiarly feminine functions. An analysis of these cases, as well as of the cases of *Muller v.*

*Oregon*, 208 U. S. 412, *Riley v. Massachusetts*, 232 U. S. 671, and *Hawley v. Walker*, 232 U. S. 718, shows that, even as applied to a regulation of hours, the regulation was sustained on the ground that the particular occupations in question involved or might involve peculiar dangers to women working longer than the limited hours fixed by statute. We claim that those cases were simply an application of the principles laid down in *Holden v. Hardy*, 169 U. S. 366, that statutory restriction of working hours, as applied to an occupation where more hours were hazardous to the employee, was sustainable, as an exercise of the police power protecting employees against the hazards of a peculiarly hazardous employment.

However, taking the broadest view of these cases where the working hours of women were restricted, and assuming that the restriction was sustained, not from the peculiar hazards to the employment as such, but because of the peculiar hazards of longer hours, irrespective of the employment, to *females*,—yet they do not sustain a statutory minimum wage as to women. The hazard or need protected against by the minimum wage statute is a natural need. It is an individual need. It is not peculiar to women, but is a need or hazard attached to every person male or female, from the time of his birth to the time of his death. The need of a “living wage” is, therefore, not a need which makes legislation as to wages sustainable in favor of women as such.

The case of *Rail & River Coal Co. v. Industrial Commission of Ohio*, 236 U. S. 338, has been cited against our contention here. In that case an Ohio statute was sustained which prescribed a method of measuring coal, where the amount of the coal taken out of the mines by the employee was, by terms of his employment, to be the basis of his wage, the statute providing that the payment in such cases should be on the basis of the weight of the coal before screening instead of after screening. The statute could not affect then existing contracts;

it simply compelled the wage which should be agreed upon by the employer and the employee to be based (if it was to be based on coal weight taken out) on the weight of the coal before screening instead of the weight of the coal after screening. Moreover, the statute was sustained as coming within the express provisions of the Ohio State Constitution providing that "laws may be passed to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas, and other minerals."

We next call attention to certain State cases directly involving the question of the validity of statutes regulating wages.

*In every case* where the principle of the minimum wage in private employment has been discussed, it has, with the exception of these Oregon cases, been repudiated as unconstitutional and not within the police power of the State. •

#### CASES DISCUSSING A LEGISLATIVE MINIMUM WAGE FOR PRIVATE EMPLOYMENT

Having shown that the authorities cited in support of a legislative minimum wage do not furnish any such support, but rather the contrary, we next cite authorities expressly passing upon the minimum wage question.

#### *Minnesota*

In 1913 the Minnesota legislature passed a minimum wage statute in all its essential features like the Oregon statute here in question. On November 23, 1914, the question of the constitutionality of this statute came before the District Court of Ramsey County, Minnesota, and the statute was declared invalid as repugnant to the constitutional provision safeguarding the liberty of contract and the right of private property and

equal protection of the laws under the XIVth Amendment. The appeal in this case is now awaiting decision in the Minnesota State Supreme Court, subject to the decision of this court in the case at bar.

The Minnesota Statute (Chapter 547, Gen. Laws 1913), in all its essential features and particularly those held by the Minnesota court to be repugnant to the Federal Constitution, is similar to the Oregon Statute. It establishes the "Minimum Wage Commission," composed of the State Commissioner of Labor with two others appointed by the Governor (Section 1). That Commission may investigate the "wages paid to women and minors in any occupation in the State" (Section 2). Employers must keep a register of names, addresses and wages paid. (Section 3). Commission may hold public hearings at which all interested persons may appear and testify. (Section 4). If the Commission forms the opinion that one-sixth or more of the women or minors employed therein are receiving less than "living wages" the Commission may establish minimum rates of wages for said occupation (Section 5). It may determine such wages, for women and minors of ordinary ability and also for learners and apprentices, and issue its order, effective as to said occupation throughout the State, or within any area of the State if differences in cost of living warrant such restriction; which order shall be mailed to employers affected, posted by such employers and filed with the Commissioner of Labor (Section 6).

The Commission may establish and appoint as to any occupation an Advisory Board of thirty persons, one-third representing employers, one-third employees and one-third disinterested (Section 7). Such Advisory Board may investigate and recommend to the Commission its estimates of the minimum wages sufficient for "living wages" in any occupation (Section 8); which estimates may be adopted by the Commission and made effective by its final order (Section 9). The Commission may change old rates and order new minimum rates (Section 10).

Special licenses allowing employees to work at a less wage than the minimum ordered in any occupation, and under a special wage ordered as to such persons excepted, may be issued by the Commission, but such licenses shall not extend to more than one-tenth of the whole number of workers in any establishment (Section 11).

Every employer in any occupation is prohibited from employing any worker at less than the living or minimum wage so fixed. (Section 12.) Discrimination against employees testifying prohibited (Section 13). A worker receiving less than the minimum wage ordered by Commission may recover the difference with costs and attorney's fees, notwithstanding any agreement to work for a lesser wage (Section 14). Sections 15 to 18 require Commission to enforce orders and make reports and provide for financing the Commission.

Any employer violating any of the provisions of the Act is punishable by fine or by imprisonment (Section 19). "Living wage" or "minimum wage" defined as "wages sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life." "Woman" means a female of eighteen years or over. "Minor" means a male person under twenty-one years or a female person under eighteen years. "Learner" and "apprentice" mean either a woman or minor. "Occupation" means any business, industry, trade or branch of a trade in which women or minors are employed (Section 20).

Under this Act the Minnesota Commission ordered and promulgated certain minimum wages (detailed in the decision below) effective November 23rd, 1914. Two employers brought suits in the district court of Ramsey county for an injunction prohibiting the State Auditor from supplying funds for the Commission, and against the Commission itself from attempting to enforce the order in question, on the ground that the Statute was repugnant to the XIVth Amendment of the Federal



Constitution; and pending final determination, asked for temporary injunction. Such injunction was granted by decision filed November 23rd, 1914. Judge F. M. Catlin presided.

The decision of the court, filed by Judge Catlin, is as follows:

"This action (*A. M. Ramer Company v. Eliza P. Evans, et al.*) and the case of *Williams v. Eliza P. Evans, et al.*, which was submitted to the court at the same time and upon the same arguments, were both commenced in this court, as a necessary preliminary step in established court procedure, to obtain a conclusive determination, by an appellate court, of the serious question, whether Chapter 547 of the General Laws of Minnesota approved April 26, 1913, entitled "an Act to establish a Minimum Wage Commission and to provide for the determination and establishment of minimum wages for women and minors" is a legitimate exercise of legislative power or transcends the fixed limitations of our fundamental law.

"After organizing pursuant to the provisions of this Act, a 'Commission' composed of the defendants, did on October 23rd, 1914, promulgate two, so-called, orders to become effective November 23rd, 1914, one of which purports to fix a minimum wage of \$8.50 for women and minors 'of ordinary ability (exclusive of learners and apprentices)' engaged 'in any mercantile, office, waitress or hair-dressing occupations' in cities of the second, third and fourth class, and the other purports to fix a minimum wage of \$8.25 for women and minors 'of ordinary ability (exclusive of learners and apprentices)' engaged 'in any manufacturing, mechanical, telephone, telegraph, laundry, dyeing, dry-cleaning, lunch-room, restaurant or hotel occupation' in cities of the second, third and fourth class.

"The Act and the orders issued thereunder created a radical and far-reaching innovation in this state. Manifestly it will be necessary for employers of women, and minors in all the enumerated occupations, to re-adjust their business arrangements to an untried standard. Manifestly many women and minors, incapable of earning 'the minimum wage' must lose their employment.

"It would seem, therefore, that common fairness and public interests should require a court of equity to maintain the *status quo* until the ultimate determination of the constitutional questions involved, especially when this Act itself (Section 14) protects the workers from loss, while on the other hand employers suffer inconvenience

and injury by enforcement of the statute. Moreover, the act involved is drawn along the general lines of an Oregon Statute from which some of its provisions are taken *ipsis simis verbis* although the Oregon Act includes 'minimum hours and standard conditions of labor' as well as 'minimum wages.' The validity of that Act is to be determined by the United States Supreme Court in a case there pending and to be submitted December 7th next, and the decision therein will doubtless dispose of all the main questions involving the Minnesota Statute. With this decision in prospect, plaintiff's counsel suggested at the hearing hereof that defendants stipulate for a suspension of the Commission's so-called orders until the validity of the act is settled—allowing the commission otherwise to proceed with its work. However, the defendants refused to consent thereto.

"All the facts and conditions cited in the foregoing are, however, insufficient alone to warrant a court of equity in granting an injunction in this case, but they are not to be wholly ignored by the court in reaching its conclusions and have not been.

"Inasmuch as the decision of this court is as indicated, a mere step towards the determination of the case by a higher court, it will serve no useful purpose to here review or analyze the decisions cited by counsel as bearing upon the constitutional questions involved, nor to indicate this court's lines of reasoning nor to argue conclusions therefrom. Suffice it here to say that this court is of the opinion that Chapter 547 of the General Laws of 1913 is unconstitutional because:

"First: It delegates legislative power to an appointive commission and places in that commission a discretion as to whether there shall be a minimum wage or not; leaves it for the commission, as purely discretionary, to determine what (if any) such wage shall be and when, where and under what circumstances it shall become effective, and under what circumstances and when a wage once fixed by it can be changed or repealed merely by virtue of its own orders; and further, it makes the Commission a sort of independent supervisor or *pater familias* of the women workers and their employers such as the State cannot lawfully become until the form of our government has been entirely changed.

"Naturally resulting from this delegation of such legislative discretion the orders issued as aforesaid by the Commission are indefinite, unequal in application and not uniform in operation (assuming for the illustration that

in any given locality. the cost of supplying 'the necessary comforts and conditions of reasonable life' is exactly the same for a telephone girl as for an office girl whose 'living wage' is made greater).

"Second: The statute necessarily abridges the right of individuals to make contracts, interferes with the right of both employee and employer to contract for the labor to be furnished one by the other; and it therefore violates the provisions of the 14th Amendment of the Federal Constitution and is invalid unless it be a legitimate exercise of the police power of the State. But there is no reasonable foundation for holding this act to be necessary or appropriate to protect the safety, health or morals of working women nor is it reasonably calculated to promote the general welfare of the public in the manner claimed by its advocates. On the contrary, it is quite as likely in actual results to increase both distress and immorality if morals are dependent on wages. Hence, it is not a valid police regulation and therefore the temporary injunction is granted.—Catlin, J."

*A. M. Ramer Co. v. Eliza P. Evans, et al.*, and *Williams v. Eliza P. Evans, et al.*, District Court, Ramsey County, Minnesota, filed Nov. 23, 1914.

### Wisconsin

In a recent case decided by the Supreme Court of Wisconsin, *State v. Lange Canning Co.*, 157 N. W. (Wis.) 777, 781 (decided May 2, 1916), similar questions were involved. The State Industrial Commission, acting under authority of the labor statute, had issued orders (1) that in pea-canning factories women employees may be employed not to exceed 10 hours each day, and (2) that during the *rush season*, women engaged in the process of canning only, may be employed not to exceed 12 hours each day, if they be paid time and a half for all time worked over 10 hours a day.

The effect of the second part of the order was obviously a wage provision which was attempted to be sustained under the general object of the statute, which was "to protect the life, health, safety and welfare of any female." As to this part of

the order the question was in what way this wage regulation could be justified as a protection of the "life, health, safety or welfare of females," and on this point the Wisconsin Supreme Court said (p. 781) :

"Attention is called to Order No. 2. Are the provisions of this order in the interest of women employees or in the interest of their employers? *Does the amount of wages a woman receives for doing certain specified work determine whether or not the work is detrimental to her health? Is it in the interest of the public to permit women to work under unhealthful conditions for high wages?* The power granted by the statute to issue general orders 'to protect the life, health, safety and welfare of any female' is here exercised to prolong the hours during which a female may be required to work and in the interest of her employer, and not in her interest. Then, too, what would a special order 'to protect the life, health, safety and welfare of any female' be? Is it supposed that the commission should determine what hours a particular female should be allowed to work for a designated employer at a designated task? *This is a thing the Legislature itself could not do.*"

*State v. Lange Canning Co.*, 157 N. W. (Wis.) 777, 781.

The Wisconsin court declared the statute unconstitutional as unduly delegating legislative powers to a commission to determine what occupations were, and what were not, prejudicial to the health and welfare of women, and the particular ground for declaring the statute invalid was this objection that it delegated legislative power.

Later, without, however, retracting its decision as to the wage features, the court on rehearing modified this original decision, and held that it was competent for the legislature to empower the Commission

"upon investigation to determine as a fact what class or classes of employment are dangerous or prejudicial to the life, health, safety or welfare of females and to determine as a fact how long females may be engaged in the several classes of employment reasonably without danger or prejudice to the life, health, safety or welfare of such females

and to establish by general orders such classification and the time which females may labor thereon, so found."

*State v. Lange Canning Co.*, (Opinion on rehearing filed Nov. 14, 1916).

In other words the statute was sustained as to regulation of hours, and as to any orders that the Commission might make reasonably regulating hours, but the power to fix wages, even to the extent of determining what excess hours should be paid time and a half, was held not a proper regulation.

*State v. Lange Canning Co.*, 157 N. W. (Wis.) 777, and Opinion on rehearing filed November 14, 1916.

### *Indiana*

The Legislature of Indiana passed an act prohibiting under penalty any employer engaged upon public work of the state, counties, cities or towns from paying for any unskilled labor less than twenty cents an hour. The Supreme Court of Indiana held the act unconstitutional as infringing the liberty of the citizen, as class legislation, and as having the effect to deprive the employer of his liberty and property without due process of law, and as denying to him the equal protection of the laws. The question in this case was different from that decided in the case of *Atkin v. Kansas*, 191 U. S. 207. There the only question was the right to legislate *as to hours* of employees engaged *in public work*, irrespective of the hazards of the work. This, as we have seen, was decided on grounds independent of any question of police power, but was based solely on the power of the State to legislate as to the terms and conditions under which work for itself,—that is, public work—should be done. The Washington Supreme Court, in the case of *Malette v. Spokane*, 71 Wash. 205, decided December 31, 1913, as we have seen, extended that rule to a minimum wage for laborers employed in public work. The Indiana Supreme Court, however,

refused to extend the application of the rule in *Atkin v. Kansas* to a compulsory minimum wage in public work. It will be for the Supreme Court of the United States to say which of these two state courts has been right in regard to these decisions. The question of the minimum wage even in public work has not yet been decided by the Federal Supreme Court. It is certain that if that court should sustain the Washington decision, or reverse the Indiana decision, it will be on the ground that, because the employment involved is public work, there is no question involved as to police power, and this for the same reasons as stated in the case of *Atkin v. Kansas*. Accordingly, then though the Federal Supreme Court shall sustain the power of the State to fix a minimum wage in public work, such decision will in no wise support the claim of the right of the State to fix a minimum wage in private employment. On the other hand, if the Federal Supreme Court shall refuse to confirm such power in the State, it will be for the reason that a minimum wage, even for public work, does not come within the power of the State, either as controlling to that extent its own contracts, or under any proper exercise of police power.

The Indiana Supreme Court approached the question as though it stood upon the same ground as would a legislative minimum wage in private employment. We have, therefore, in the decision of the Indiana Supreme Court, the views of the highest court of one of the states with respect to the power of the State to fix the minimum wage in private employment. In deciding that such attempted exercise of power was unconstitutional, and did not come within the proper exercise of the State's police power, the Indiana Court said:

“If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise, and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil



liberty. Among the most odious and oppressive laws ever enacted by the English Parliament, in the worst of times, were the statutes of labor of Hen. VI and Edw. III. *These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own country, required him to work for the first employer who demanded his services, and punished every violation of the statute with severe penalties. In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions.* The circumstance that the act of March 9, 1901, reverses the conditions of the statutes of labor of Hen. VI and Edw. III, and lays the burden and the penalty upon the employer instead of the laborer, does not render it any less pernicious and objectionable as an invasion of natural and constitutional rights. Statutes similar to this have been before the courts of others states, and in nearly every instance have been held unconstitutional. *People, ex rel., Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *State, ex rel., Bramley v. Norton*, 5 Ohio, N. P. 183; *Com. v. Perry* 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Jones v. Great Southern Fireproof Hotel Co.*, 79 Fed. 477; *State v. Julow*, 129 No. Car. 163, 29 L. R. A. 257, 31 S. E. 781; *Shaver v. Pennsylvania Co.*, 71 Fed. 931; *Atkins v. Randolph*, 31 Vt. 237; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Cleveland v. Clements Bros. Constr. Co.*, 67 Ohio St. 197, 59 L. R. A. 775, 65 N. E. 885.

"The statute of March 9, 1901, is obnoxious to the further objection that through its operation a citizen may be deprived of his property without due process of law. If the minimum price to be paid by municipal subdivisions of the state for unskilled labor on public works exceeds the rate at which such labor can be obtained by other persons at the same place, then the excess so paid for labor on public improvements is taken from the citizens assessed for such works, not by due process of law, but by a mere legislative fiat. The citizens of the state, who must, through assessments made upon their property, pay for the public works of counties, cities, and towns, are entitled to have such work done at such rate of wages as the local agents and official representatives of such municipal subdivisions of the state may be able to secure by contract. They cannot be required arbitrarily to pay higher wages than laborers employed on public works or improvements in their par-



particular district demand, *any more than they could be compelled by similar legislation to pay a minimum rate of wages to laborers employed by them in their private business*. If the minimum rate fixed by the statutes exceeds the market value of such wages, the excess is a mere donation exacted under color of law from the citizens liable to assessment for the public improvement, and bestowed upon the unskilled laborer. Public revenues cannot be applied in this way. *McClelland v. State*, 138 Ind. 321, 37 N. E. 1089; *State ex rel., Tieman v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 309.

"Lastly, we think the statute obnoxious to the objection of class legislation. In fixing the minimum rate of wages to be paid for unskilled labor to be employed by counties, cities, and towns, on public improvements, a classification is made which is unnatural and unconstitutional. The laboring men of the state may, for some purposes, constitute a class concerning which particular legislation may be proper. This classification has been recognized and sustained in statutes requiring the payment of wages in lawful money of the United States, forbidding the assignment of future and unearned wages, and in similar acts. But no legal and sufficient reason can be assigned for placing unskilled labor in a class by itself for the purpose of fixing by law the minimum rate of wages at which it shall be employed by counties, cities, and towns on their public works. Why exclude the skilled mechanic from the benefits of the act? Why compel the payment of a higher rate of wages to the unskilled laborer than may be demanded by the skilled mechanic for more difficult and important work, requiring special training, experience and a higher degree of intelligence? Unless the Legislature has the power to fix the minimum rate of wages to be paid by counties, cities, and towns to carpenters, stone masons, brick layers, plumbers, and painters employed on local improvements, treating each trade as a separate class, it has not the power to enact laws fixing the compensation of unskilled laborers employed on similar works. No sufficient reason has been assigned why the wages of the unskilled laborer should be fixed by law, and maintained at an unalterable rate, regardless of their actual value, and that all other laborers should be left to secure to themselves such compensation for their work as the conditions of supply and demand, competition, personal qualities, energy, skill, and experience may enable them to do.

"After the most careful and thorough examination of all the questions of law presented by the demurrer in this

case, we are satisfied that the ruling of the lower court was not erroneous, and its judgment is therefore affirmed."

*Street v. Varney Electrical Co.*, 160 Ind. 338.

The highest authority on the law of *Master and Servant*, after a consideration of all the modern arguments for and against a minimum wage in private employment, holds that there is no authority or power in a State to establish or enforce such a wage:

"In the American States it would seem that no legislation of this type has ever been enacted, except with respect to public employments. *So far as respects work in which neither the state itself nor any political subdivision thereof is concerned*, there can be no reasonable doubt that, even where the matter is not covered by an explicit provision in an organic law, a restrictive statute would, under the general principles of American constitutional jurisprudence, be treated by the courts as invalid, whatever might be the nature of the business affected."

*Labatt, Master and Servant*, Sec. 846, p. 2285.

Judge Cooley, in his *Constitutional Limitations*, says:

"In the early days of the Common Law, it was sometimes thought necessary in order to prevent extortion to interfere by royal proclamation or otherwise, and establish the charges that might be exacted for certain commodities or services. The price of wages was oftener regulated than that of anything else, the local magistrates being generally allowed to exercise authority over the subject. The practice was followed in this country and prevailed to some extent up to the time of independence. Since then it has been commonly supposed that a general power in the state to regulate prices was inconsistent with constitutional liberty."

*Cooley, Constitutional Limitations*, p. 820.

The establishment of the right to regulate prices in a certain public or quasi-public enterprise operated under grants from the State, furnishes no parallel. In such cases, so far as private property is affected, the private property is used under a public grant and for that reason subjected to regulation by the State, including the regulation of rates. The public, through the State, has a certain interest carrying with it the right of

control necessary to regulate such rates. Before the adoption of the Fourteenth Amendment, this right in the State was carried to an extreme in fixing maximum charges, and even at arbitrary rates, for all classes of industries. But with reference to such regulations, the Federal Supreme Court has said:

"Down to the time of the adoption of the Fourteenth Amendment it was not supposed that statutes regulating the use or even the price of the use of private property *necessarily* deprived an owner of his property without due process of law. Under some circumstances they may, but not in all. \* \* \* This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and without its operative effect. Looking then to the common law from whence came the right which the Constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only. \* \* \* When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in the use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use.*"

*Munn v. Illinois*, 94 U. S. 113, 125.

Certainly the occupations of the merchant, wholesale or retail, and other occupations made subject to the minimum wage statutes, are not of the class specified by Judge Cooley as being subject to price regulation, either in the form of minimum wage regulation, or otherwise.

If a State is warranted, under the exercise of its police power, in fixing a compulsory minimum wage in private employment, it would be by the same token warranted in fixing prices of any or all commodities, which are the subject of contract and which are marketed and sold at prices governed by the economic law of competition. It is because such legislation defies the natural laws of competition and creates artificial and arbitrary interference therewith, that it is repugnant not only to our fundamental law, but also to the policy of our laws. In this connection I will call attention to certain objections based upon public policy, under the head of "Economic Objections."

## III

**Economic Objections**

As preliminary to a discussion of economic objections, and for the purpose of better understanding what follows, we shall present some observations upon the minimum wage as an ethical measure.

## MINIMUM WAGE AS AN ETHICAL MEASURE

It is unnecessary to discuss the advocacy of the minimum wage made by that class of social and political antagonists to restraint from either constitutional or economic law who represent modern socialist doctrines. The socialist demands as a matter of fundamental human right the equal division among all citizens of the state of an ownership or direct property interest, not only of all private and public property within the jurisdiction of the State, but also of all profits, revenue and proceeds therefrom. Both the theory and practice of wages as such are repudiated as a part of a prevailing fundamental system of injustice. An orthodox socialist could not, therefore, be a consistent advocate of the minimum wage. The socialistic spirit of compulsory division, of disregard for economic law, and of defiance of constitutional restraint, has, however, pervaded the advocacy of the minimum wage, in so far as it bases the absolute right to a minimum wage,—computed by the full measure of the necessities of living in comfort and in health,—upon the mere fact of the existence of the wage earner, regardless of his efficiency, regardless of his wage-earning ability, regardless of the benefits of his labor to his employer, and regardless of every other consideration. Such advocacy of the minimum wage is but one phase of a socialistic attitude, demanding concessions and even division of property and income,

on the theory that the fact alone of possessing life entitles its possessor to share in all other possessions or advantages held by other living beings. In justice to Father Ryan (author of "A Living Wage"—see *infra*), it should be borne in mind that while he is an extreme advocate of the minimum wage, particularly upon ethical and religious grounds, he is an active antagonist of the socialistic system (see Debate on Socialism between Morris Hillquit—affirmative—and John A. Ryan—negative—in October, 1913, and following numbers of Everybody's Magazine).

In the purely ethical phases of the question there is little field for contention; because this, as any question of ethics, involving the abstract question of duty, of right and wrong, of charity, of benevolence, of sacrifice for others, becomes from its ethical viewpoint more like a question of religion. It must be solved in fact by each individual or each community of individuals according to the dictates of conscience. The means for accomplishing beneficial results are enlightenment and moral suasion, inducing so far as possible voluntary co-operation and thereby bringing promised benefits in proportion to the extent of the co-operation secured. Such ethical advocacy of the minimum wage is based on an assumed right of every person to have and receive that certain amount of material goods which is sufficient to afford him a decent livelihood; that this right is a moral right, based on his intrinsic worth as a person; and that it is a right as valid, even if of less importance, as his right to life. It is said that the laborer's right to a living wage is but the specific form of his generic right so belonging to every person ("A Living Wage, Its Ethical and Economic Aspects," by John A. Ryan, published by McMillan Co., New York and London, 1912, Chap. XIX, page 324).

With such advocates the question involved is one between the method of unrestricted bargaining as to wages and a "professedly ethical standard." ("A Living Wage," page 22). Economic law is an abstract bogey with which the question has no

real relation, because moral forces may overcome the forces of economic law, and in any event the moral right of the laborer is paramount to the economic rights of the employer, whose moral duty to his employee is gauged by the asserted moral right of the latter. "As a determinant of rights, economic force has no more validity or sacredness than physical force." The employer's right to any return on his investment is subordinate to the laborer's right to receive from him a living wage ("A Living Wage," pages 10, 326, 261). The living wage doctrine, then, to this class of advocates, is an ethical question and even a question of purely religious ethics; and the remedy to be thereby accomplished is to be brought about through moral suasion addressed to individuals, furthered by organized effort. "There must be an appeal to the minds and hearts of individuals and the fullest utilization of the latent power of organization and social institutions" ("A Living Wage," page 34, page 331).

The ethical advocate, also, recognizes no practical obstacle to the establishment of a minimum wage arising from the forces of economic law. He casts aside such opposing forces as non-existent because in practice they will be found to be actual only in the minds of the abstract economists; or, if it transpires that they are real, then any disastrous economic result should be submitted to because of the paramount nature of the moral or ethical law establishing the right to the minimum wage. Voluntary recognition of this right and co-operation in the establishing of the minimum wage should be brought about by persuasion and by organization. Compulsory submission can be only brought about indirectly by influence and example. In short, to the ethical advocate, the minimum wage can be established only to the extent that voluntary co-operation may be induced. A preliminary requisite to any legislative minimum wage would be necessary changes in the federal constitution and in the constitutions of the several states, and these necessary changes would be very difficult to obtain ("A Living Wage," page 313. Also "The Minimum Wage as a Legislative Proposal in the

United States," by Prof. Lindsay, page 52, in *Annals of American Academy of Political and Social Science*, July, 1913).

The foregoing summary of the advocacy of the establishment of a minimum wage through the general recognition of a moral or religious right or duty is of more than incidental interest. Its urgency of co-operation as a means of accomplishing the benefits to low-paid labor suggests a practical means of obtaining beneficial results through the minimum wage.

It was the recognition of the promotion of voluntary co-operation between employer and employee in improving wage conditions that suggested the first minimum wage statute enacted in the United States. This was the Massachusetts Statute of 1912. The theory of this Massachusetts Statute was that a directly compulsory statutory minimum wage was not in this country consistent with the constitutional rights of liberty of contract and of rights of property belonging to both the employer and employee; but that the State through a milder Statute could promote the beneficial effects of moral suasion. In its inception this Massachusetts Statute was intended to be purely "non-compulsory," and at the time that it was first passed there was reason to believe that it might work out as a constitutional measure, ameliorative of wage conditions. But this so-called "non-compulsory" statute has been shown by experience to be even more drastic and more violative of constitutional protection than the admittedly compulsory statutes likes those of Oregon here in question. For a discussion of these points we refer to the discussion below under the head "IV.—Preponderant Opinion—Minimum Wage Legislation in the United States—The Massachusetts Statute."

The minimum wage by voluntary co-operation, is altogether, as it must be admitted, a logical, workable measure. Whether we agree that it is properly based upon the natural and paramount right of a laborer to receive, and the controlling duty of the employer to provide, in all instances, a living wage, is unimportant. Its object is beneficent; it is humanitarian, and



as such its accomplishment must be recognized as desirable, so far as any concrete beneficial results are not necessarily attained at the expense of other resulting disadvantages of greater importance.

The preservation of the voluntary element, however, is the means through which are obviated many of the obstacles to the practical working of a compulsory minimum wage. Under the system of voluntary co-operation, employers cannot be driven out of business; neither will the prices of their products be increased so as to deprive the recipient of a minimum wage of its benefits; neither will the minimum wage tend so much to become the maximum wage. Under a system of co-operation, the necessary adjustments, more in accordance with the natural economic law, will be worked out, and thereby artificial and unfair discrimination between competitors in the same industry will tend to be obviated.

The argument for the voluntary co-operative establishment of a minimum wage, whether as an ethical or a humanitarian measure, is far from answering the objections based upon economic and constitutional grounds to the expediency or practicability of a legislative minimum wage.

#### MINIMUM WAGE AS AN ECONOMIC MEASURE

There are certain rules of economics which, when formally expressed, are merely the statement of certain natural laws of industrial science and of the science of trade and commerce. Such economic laws are controlling in the same way, even if not to the same extent, as natural laws of physics are controlling in respect of the phenomena of nature to which they are applicable. Disregard or violation of such natural law, whether it be economic or physical, tend in all instances to cause, and in many instances inevitably cause, disturbance and even disaster.

Sometimes the disturbance is merely local or temporary, and its effects may be overcome or remedied by either natural or artificial adjustments. When, therefore, a course of action is proposed which from its very nature is in conflict with natural economic laws, it is wise to proceed with caution, lest the resulting disturbance bring injurious effects greater than the proposed or possible benefits. The solution of any such question cannot be based solely upon the desires, necessities or the resulting benefits to any particular individual or, indeed, to any particular class of individuals. There is no system of governmental or industrial organization or policy which can be so perfectly organized and administered that, with all its varying talents, degrees of efficiency or of frailty, it can act with equal benefit to all persons; or which even can fail to leave some individuals or some class of individuals not only without benefits but with comparative disadvantage resulting from the system itself. The rule of measure of merit is "the greatest good to the greatest number." This is a rule not only of ethics and of economic law, but also of the law of governmental and legislative policy.

Any artificial interference with the wages to be paid to labor *in private employment* is an interference with the natural economic law of supply and demand. It is also an interference with the natural economic law of industrial competition. This is true as to the compulsory establishment of a wage for labor, whether the fixed wage be a minimum or a maximum. A compulsory minimum wage, whether computed upon the basis of a sum adequate to provide a decent livelihood with reasonable comforts, or upon any other basis, has inevitably the tendency, to say the least, and, it must be admitted, in some cases it has the necessary effect, to disturb the natural conditions governed by the law of supply and demand, by the law of competition and by other economic laws.

From this fact there have been urged with greater or less reason, and by some as insuperable, certain economic objec-

tions to a compulsory minimum wage, as presenting obstacles to its successful application in the modern industrial world. Examination of some of these objections will throw light upon the discussion with reference to the legislative minimum wage as applied in this country.

### ECONOMIC OBJECTIONS STATED

#### *1. Creates Artificial Discrimination*

The first objection is, that it necessarily creates an artificial discrimination in any occupation or industry to the disadvantage of those employers subject to the fixed wage, and in favor of others who are competitors. A federal minimum wage statute would be impossible without changing our system of government and by amendment of the Federal Constitution. Such an amendment would forever do away with the well-established principle that there should be and has been reserved to the several States all the powers of self-government and of legislation touching internal affairs and business and the relations between their citizens which are not properly powers of federal control and as such expressly imposed upon the federal government or which are not expressly prohibited to the states. So far, then, as concerns a minimum wage, the United States comprises forty-eight separate, competing sovereign countries with widely varying conditions of employment and wage standards.

The market for products of state industries, however, is not only nation-wide, but world-wide. In many industries the margin of profit is so small that the slightest disturbance of their extra-state market, the industry could not survive. If wages which are now fixed by competition and by the law of supply and demand were artificially raised in one locality, the

competitors in other localities would control the price of commodities and shut out of business those whose wage-rate was artificially kept above the rate made by their competitors.

For the same reason similar results within a state would follow upon the enforcement of a minimum wage fixed for one city or locality, or for one class of cities or localities, as against a different wage for other localities. An artificial discrimination would be created as to any particular occupation or industry against the localities with higher wage and in favor of those with a lower one. Nevertheless, the minimum wage statute generally contemplates just this sort of discrimination between different localities in the same state. The fact that the cost of living is different in different localities is not a justification for a lack of uniformity in the minimum wage. The employer in the industries located in the larger urban localities, while at a disadvantage with the higher minimum wage based upon the greater local cost of living, has the advantage of better transportation and market facilities; whereas, the employer in the country, with a less minimum wage than where the cost of living is more, has the disadvantage of his less central location, poorer transportation facilities and less advantageous market. The actual cost of production does not vary with the cost of living of the employee.

A state compulsory minimum wage, therefore, based upon the cost of living necessarily results in artificial and unfair discrimination. And this is true, even if fixed wages were established for the same industry or occupation throughout the state. But the result is even more disastrous when it is proposed, as under the present statute, to establish a minimum wage as to a certain occupation in one locality without at the same time interfering in any way with the wage in the same occupation in another locality.

The discrimination resulting is all the more obnoxious to those industries in states where the margin of profit has already been cut by the establishment in practice of a higher

wage rate than similar industries pay in other states. For instance, Massachusetts is near the head of the list of states in high wages. A still further raise of wages there, by compulsion, would create against the industries of that state a discrimination more serious than it would be in a state having already low wages. It would be a penalty upon that locality whose citizens by co-operation had raised the standard of its employees. Through their mail order departments Massachusetts merchants are direct competitors in the same industries with the merchants of other large cities who pay less wages.

Discrimination, which is unfair and which would tend to become destructive of industry, is, therefore, a valid economic objection to a compulsory minimum wage.

## *2. Is Destructive of Business*

The compulsory minimum wage would also necessarily tend to, and in many instances would, drive employers out of business, by destroying profits or by turning profits into losses. This would be the result of the artificial discrimination between different localities, already noted. It would also be the natural result even where there was no local discrimination. From varying conditions affecting different industries, the margin of profit varies greatly. Many employers are already so near the restrictive limit of profit that they could not continue if additional expense were added by increasing wages by compulsion. We may view such destruction of business as economically wrong, and we may view it as resulting in the taking of property for the benefit of the employee class without due process of law. The force of both these views is recognized by the advocates of the minimum wage who base the right of the employee to have from his employer at least a certain wage upon the generic right of the employee to receive, and the corre-

sponding duty of the employer to furnish, at least a minimum living wage, and make that right of the employee paramount to any right of the employer. But, they argue, if the result is to "drive any employer or any industry out of existence, the tendency should be welcomed." The employer, individual or corporate, who may be unable to survive, and whose income from his investment is destroyed by enforcement of the minimum wage, is relegated to the class of undesirable citizens or of "soulless trades" whose extinction, as "social parasites," should be hastened. ("Minimum Wage Legislation," by John A. Ryan, Catholic World, February, 1913. Also, Annals American Academy Political and Social Science, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, page 45).

### *3. Increases Prices and Cost of Living*

Another inconsistent result, due to the inevitable working of natural economic laws, is that the general enforcement of a minimum wage in any industry would necessarily result in increase in the price of the product or wares in the market. Such rise in prices would increase the necessary cost of living, which cost is to be the basis at which the minimum wage is maintained. Experience has shown that increase in price is generally greater than a proportionate increase in the expense, by reason of which prices are raised. The uncertainty of application of the compulsory minimum wage has to be guarded against and on account of that hazard the rise in prices would naturally be greater than that warranted at any particular time by the then arbitrary increase in expense. The resulting change in the cost of living calls for a further increase in the minimum wage and that in its turn results in a further increase in the cost of living; and so, at least to certain limits,

the tendency is to establish a sort of automatic lever acting at recurring intervals constantly towards a rise not only in wages, but also in prices, with the rise in one direction counteracting the effects of the rise in the other.

That this is the necessary tendency, and to some extent the inevitable result, of a compulsory minimum wage, is admitted by its advocates. They say, however, not without reason, that the menace of such an effect is not as great in practice as indicated by theory. The laboring class, much less that portion of it directly affected by the minimum wage, does not constitute the entire class of consumers. The effect, therefore, on prices, they say, would not be to the fullest extent claimed by those who urge fully these economic objections. The distinction thus made seems to be sound; but in any event it has to be admitted that the resulting tendency would be to eliminate the beneficial effect upon the laborer of the minimum wage and to unsettle the basis upon which such wage is from time to time computed.

A part of this same objection is, that the increased prices would, under economic laws, result in decreased demand for the product or wares in question and thereby diminish production. Diminished production in its turn is necessarily followed by diminished employment; and thus again the artificial interference with the natural law of supply and demand would in this instance result in an artificial increase of the number of unemployed; thereby decreasing, if not eliminating, the ultimate benefits to the laborer of a compulsory wage.

#### *4. Minimum Wage Tends to Become Maximum Wage*

Again it is objected that the minimum wage, established by compulsion, while it might raise the wages of the lower classes of labor, would at the same time lower the higher wages paid under the present system to the higher classes of labor. In other words, the minimum wage would tend to become the maxi-



mum wage. This question was much discussed during the political campaign of 1912 in connection with the Third Term party platform for a minimum wage for women, to be established by authority of the states and the federal government. President Wilson, in one of his campaign arguments, said with reference to this question:

"If a minimum wage were established by law, the great majority of employers would take occasion to bring their wage scale as near as might be down to the level of the minimum; and it would be very awkward for the workingmen to resist that process successfully, because it would be dangerous to strike against the authority of the federal government." ("The Legal Minimum Wage," by James Boyle, Forum, May, 1913).

The only logical remedy to obviate this and many of the objections to the minimum wage would be the impossible one of establishing by law a general minimum wage scale for all classes of wage-earners.

That the compulsory minimum wage would threaten existing trades union scales and the present standard of wages for all classes of labor, has been shown by the experience in Australia, where the tendency is for the established minimum wage soon to become the standard wage scale. The class of unthinking employees, as well as their voluntary protectors who are apparently uninformed of the economic significance of a statutory wage, overlook this objection. The skilled students of labor questions, including labor leaders of experience, agree that the warning given by President Wilson is well founded. The San Francisco Labor Council recently declared itself "opposed to the principle of establishing the rate of wages, whether for men or women, by legislation." Samuel Gompers, President of the American Federation of Labor, while favoring a living wage, opposes a legislative or compulsory minimum wage for wage earners in private employ. He says: "I recognize the danger of such a proposition. The minimum wage would become the maximum, from which we should find it necessary to depart."

(“The Legal Minimum Wage,” by James Boyle, Forum, May, 1913). Mr. Gompers also has stated with reference to the compulsory minimum wage: “I fear an outcome that has not been discussed, and that is, that the same law may endeavor to force men to work for the minimum wage scale, and when government compels men to work for a minimum wage, that means slavery.” (E. F. McSweeney, in American Labor Legislation Review, February, 1913).

The objections, then, to the minimum wage are not all from the side of the employer.

##### ***5. Bars Employment and Increases Numbers of Unemployed***

Still another objection which involves many and varied difficulties is the fact that the compulsory minimum wage will not only throw out of employment entirely a large class of laborers, dependent in whole or in part upon their earnings, but will maintain a barrier against the possible employment of all labor whose efficiency is below the standard of those entitled to the fixed wage. The employer cannot be compelled to, and he certainly will not voluntarily for any extended period, keep in his employ one whose efficiency is not up to or does not closely approach that measured by the minimum wage. Those below that standard would be gradually weeded out and afterwards kept out of employment. Under the present system those receiving a less wage than sufficient by itself to amount to a full living wage as defined, comprise generally those whose training, skill and experience are insufficient to enable them to give in return a service warranting the compensation of such wage. They comprise also those who by reason of indolence or other peculiar characteristics, inaptitude or indifference, can never reach the standard of accomplishment measuring up to the minimum wage. There are also those who, by reason of ad-

vanced years, fall below the standard required for the fixed wage. Then there are the hosts of those to whom employment in their earlier years is the main education and preparation for the power to earn, and whose employment for considerable periods at merely nominal or at comparatively low wages provides for them the means, or assists them in the means, of sustaining life while in the preparatory stages for their later work. Excluded altogether from employment by reason of the minimum wage, they would be compelled at their own expense of time and money to school themselves to the point of efficiency measured by that wage. These and other classes would be barred from any wage-earning opportunity, some of them permanently and some of them for long periods of time; and this deprivation of advantage would be accompanied by the burdens of preparation now shared between the employer and the employee.

It is true that the legislative minimum wage generally contemplates exceptions in favor of the weak, the aged, or those otherwise physically incapacitated. The scheme does not, however, provide in any way for the great mass of the unemployed which will be created and increased by its adoption. For this reason alone the results must be disastrous, at least until the same paternal government which has provided the minimum wage shall have provided for those who are thereby subjected to disadvantage and even to disaster. At the same time that the slow or inefficient or infirm worker is driven out of industry altogether into want and even pauperism, with the consequent deprivation not only to himself but to those dependent or partially dependent upon him, neither he nor those of his class can in this country ever look to a gradual betterment of their condition. The immigration of the lower class workers from Europe will continue to swell the hordes of the unemployed in this country. The arbitrary law of compulsory minimum wage, violating the law of supply and demand, will have the effect, as to every class of labor for whose benefit it is pro-

posed, to decrease the demand at the same time that it multiplies the supply. The inevitable result must be such a lack of balance and adjustment in the social and political forces of the nation that catastrophe will follow. No remedy or prevention for the result of the over-strain of natural forces will be found.

#### PREREQUISITES TO A LEGISLATIVE MINIMUM WAGE

Too many advocates of the minimum wage assume that it lies within the power of the State, through its legislature, to furnish a panacea for all evils experienced under the present wage system. They and their proposed beneficiaries assume, that once the Government fiat has been issued in legislative form, then immediate relief for all the lower classes of labor will come in the form of wages sufficient to maintain them in health and comfort. They do not consider, and if they do they blindly disregard the inevitable workings of the natural law of economics which from its very nature will not of necessity yield to statutory law. There are certain laws of nature, economic as well as physical, which are and will remain paramount to human, statute law. They are Nature's limitations upon the legislative power of man, and as such they are paramount law, without being subject to amendment, even more controlling than the written prohibitions of our Federal Constitution are controlling upon the legislative power of the federal and state legislatures. Any state which sets up an artificial standard repugnant to economic law must, if it hopes ever to establish and enforce such standard, provide in advance for the necessary readjustments inexorably demanded by the natural law which is infringed, and for the remedies of evils incident to the displacements resulting from natural forces.

The resulting evils of the enforcement of a compulsory wage standard, due to economic laws, have just been pointed out.

They suggest the protective provisions desired and measures for which, so far as the State has the power, it would be the duty of the State to provide. The army of workers, male and female, with their families dependent upon them, who suffer from old age or from other misfortunes to which wage earners are liable and against which they have not themselves been able to make adequate provision, including those who by the minimum wage are relegated, perhaps forever, to the class of the unemployed, should be insured in some way by the State against the disasters of such misfortune. Such insurance may include (1) an adequate system of workmen's casualty compensation; (2) organized illness insurance, co-operative or obligatory to the extent of the legislative power of the State, including infirmity and old age benefits.

One of the greatest needs for preliminary measures would be (3) providing for the misfortune of non-employment, through official and thoroughly organized employment exchanges, with bureaus collecting and reporting data with reference to the employment needs of the different occupations and the number and locality of various classes of employees. Such organized efforts in behalf of labor have been established in England, including even insurance against unemployment made obligatory upon a large class of employees and industries.

The next of the most important reforms to accompany or to precede minimum wage statutes should be (4) a comprehensive system in industrial trade education and for vocational guidance. These should be made not only a part of the public school system, but should be made the subject of special schools open to all present and prospective wage earners. By such means may be acquired, with less loss to the worker, that efficiency which shall measure up to the standard of the established minimum wage. The state has no right to bar from employment the worker of less than ordinary ability, or to deprive him of paying for his tuition by a diminution of his wages through his preparatory period, as would be done by the com-

pulsory minimum wage law, without providing, to some degree, at least, a substitute for the advantages of which he is deprived.

Incidentally also, (5) should be the enactment and enforcement of proper eugenic laws, in order to diminish the perpetuation of defective traits, physical or moral. Next (6) should be retained, and if necessary, extended in scope, the present system, so far as proper, of protective labor laws limiting the age of children workers, and protecting not only children but also women and men as to hours of employment in dangerous or unhealthy occupations and as to sanitary and healthful conditions in all occupations. These are all necessary to promote efficiency and to diminish the tendency of the minimum wage law to increase the number of unemployed. (Annals American Academy Political and Social Science, July, 1913, page 3; "The Minimum Wage as Part of the Program for Social Reform," by Henry R. Seager, Professor of Political Economy, Columbia University).

But of primary importance as a preliminary remedial measure (7), there must be more effective and more stringent restrictions upon immigration. All other reforms for the advancement of the employee and for the care of the unemployed will be worse than futile, while the gates at Ellis Island pour into this country a constantly arriving horde of the lower class of wage earners from Europe and other foreign countries. So long as the army of the unemployed and of the incompetent is recruited through the present unrestricted immigration, the evil results due to economic laws, of compulsory minimum wage will be increased and intensified. More than that, all attempts at remedies or readjustments, whether by the State or by organized co-operative effort, will be rendered futile. (Annals American Academy Political and Social Science, July, 1913, page 66: "Immigration and the Minimum Wage," by Paul U. Kellogg, Editor of The Survey).

When these reforms are set in motion and made effective, and only then, would it be possible to expect any substantial benefits

from a compulsory legislative minimum wage. These considerations are entirely apart from the question of the practicability of any particular minimum wage statute, or of the constitutional power of the legislature to pass and have enforced any particular statute, or a minimum wage statute at all.

#### EFFICACY OF PROMOTING CO-OPERATION

To these objections upon economic grounds above enumerated might be added many others which have been urged; but these are sufficient to show that the advisability of a compulsory minimum wage, though based upon a living wage, is not a self-evident or self-supporting fact. The questions involved are far-reaching. The objections shown by a consideration of natural economic laws are serious questions, to say the least. They must be answered satisfactorily before it is demonstrated that a compulsory minimum wage is either a practicable or wise policy.

The success claimed for the minimum wage in New Zealand and Australia is not at all a conclusive answer. It has been in operation there only during times of prosperity. It must be considered an experiment until it is demonstrated that such laws can stand the stress of adversity. Neither has its success been demonstrated by the experience in Great Britain, where the minimum wage has been applied only to a few sweated industries and also to workers in mines. The British expert, Mr. Ernest Aves, after a thorough investigation in Australasia, reported to his government as follows:

“The evidence does not seem to justify the conclusion that it would be advantageous to make the recommendations of any special Boards that may be constituted in this country legally binding, or that if this power were granted it could, with regard to wages, be effectively exercised.” (“The Legal Minimum Wage,” by James Boyle, Forum, May, 1913).



How much more difficult, then, would it be in this country, where the statutes of its legislatures are not at the same time the fundamental constitutional law. The question before the British Parliament as to a minimum wage statute was alone a question of policy or expediency. In this country the same question is involved and always at the same time the question of consistency with our system of government, expressly limiting legislative powers of the states or of the nation as against infringements of the right of contract, of personal liberty, and of the preservation of property rights.

Another reason, as stated by Mr. Aves, for the inapplicability of the experiment, as applied in New Zealand or in Australia, to a country like Great Britain or the United States, is the fact that there only a comparatively small number of workers have been or were intended to be affected by the minimum wage. So small is their number, he says, that it is "as though the whole machinery of propaganda and of the government were concentrated on a city somewhat smaller than Birmingham." ("The Legal Minimum Wage," by James Boyle, *Forum*, May, 1913).

Mr. Aves says, too, referring to results in New Zealand and Australia, that under the minimum wage law men find great difficulty in retaining situations when they pass middle age; and it becomes harder for the slow or inefficient worker to get a job, as the employers will not pay him the legal wage. Referring to the system in Victoria, the Massachusetts Commission on Minimum Wage Boards says that:

"These special boards, although authorized to secure a 'living wage,' in practice have served rather to formulate common rules for a trade, to bring employees and employers into co-operative rules and to provide suitable machinery for the readjustment of wages and other matters to changing economic conditions." (See Report Massachusetts Commission on Minimum Wage Boards, January, 1912, pages 14-15; "The Principle of the Minimum Wage," by A. C. Pijou, *Nineteenth Century*, March, 1913; "Minimum Wage and Its Consequences," by Sidney Brooks, *The*

Living Age, May 11, 1912; "The Economic Theory of a Legal Minimum Wage," by Sidney Webb, the Journal of Political Economy, December, 1912; "Massachusetts and the Minimum Wage," by H. LaRue Brown, Chairman of Massachusetts Minimum Wage Commission, Annals Academy Political and Social Science, July, 1913, pages 13, 16, 17).

The system as so administered is not considered antagonistic to the interests of either the employer or the employee.

Therefore, so far as the practical application of the statutory minimum wage is concerned, any practical beneficial effects have been, not through the enforcement of its compulsory features, but by reason of the official promotion of co-operation between employers in raising the standard of wages.

The economic objections here suggested are supported by the authority of Professor F. W. Taussig, of Harvard University, who in May, 1916 presented the result of his studies of the subject in the *Quarterly Journal of Economics*. Directing his discussion to the minimum wage statutes of the United States which, as he says were "designed to be effective for the lowest-paid grade of women's labor only," he says:

"Both in the factories and shops the great majority of women are young. Of all the women employed, at least half are between the ages of 16 and 25; among those who work in factories and shops, the proportion of young women is even greater. It follows that they are a shifting class, industrial birds of passage. One set enters the shops and factories and remains there a year or two, at most a few years. Its members marry, and are succeeded by a new set. Though there are some older women in the group here under review—the lowest-paid group—it is made up chiefly of the young. And from their youth and the temporary nature of their work it follows that in the main they are unskilled or inexperienced; or, if skilled and experienced, only in such tasks as can be easily learned."

"Again, the majority of these girls and women live at home. They are ordinarily members of a family group which makes common cause in domestic life. \* \* \* The

typical female workers are the eighty per cent living at home and contributing the larger part of their earnings to the family treasury. Twenty per cent of the girls at most are independent workers."

\* \* \* \* \*

"The girl who earns \$6.00 a week and brings home that sum as a contribution to the family earnings adds to the joint resources more than she adds to the joint expenses. \* \* \* The circumstances that they live at home contributes immensely to swell the *numbers* offering themselves in the labor market and affects immensely the wages which they get; and it also affects the industrial quality of their work. Here we have what is, from the point of view of economic theory, the crux of the situation. There is no proposition so universally accepted in economics as that the remuneration of persons in any labor-group depends directly on the numbers in that group. It is greater if the numbers are small, less if they are large."

\* \* \* \* \*

"Now, the general economic presumption is that when a given price has come to rule in a market, it is the price fixed by the conditions of that market. If the wages of a particular kind of labor are low, as in the case of unskilled men, the explanation presumably is that there are many of them and the marginal desirability of their labor is small. If the wages of unskilled women are even lower, presumably it is because the marginal desirability of their labor is still smaller. Economists have speculated what consequences would ensue if ordinary muscular labor were scarce—if only a select few could handle the pick and the shovel and the plow; how much their labor would be desired and how high would be their wages. And we might similarly make the hypothesis that but few women were in the labor market; then doubtless, it would appear that there were some tasks for which they were peculiarly fitted and peculiarly desirable; and the wages of the limited number would be comparatively high."

\* \* \* \* \*

"It seems to follow, further, that to set a rate of wages higher than the going market rate, will not accomplish the object in view, or at least the main object desired—namely to bring up to the minimum *all* now employed at the lower

rate. At higher wages not so many can find employment. And while the number demanded at these wages will be less, the number seeking employment is likely to be greater. Professor Persons has remarked that a certain number of women who are now tempted to offer their services in the market will be tempted by the better pay. With less numbers demanded and larger numbers offering, there will be a selection of the more desirable, a rejection of the less desirable, *non-employment* for a certain proportion. How large the proportion of unemployed will be, must depend on the conformation of the demand schedule; but unemployed there will be, and hence failure to accomplish the desired object. Such seems to be the first and simplest application of economic theory to the case."

Professor Taussig denies that the low wages of women are explicable on the ground that they are weak bargainers:

"The explanation of low wages is to be found in that ultimate source already indicated—the marginal service—ability or vendibility of the particular kind of labor, and therefore in the *numbers* offering it in the market.

\* \* \* \* \*

"The fundamental cause, we are forced to believe, is in the numbers of those seeking employment. And these numbers are part of the mass of unskilled workers whose pressure for employment so profoundly influences our industrial and social conditions in every direction. The low wages of factory women are indissolubly associated with the problems of immigration. The constant recruiting of the rank and file of unskilled workers by the inflowing army of immigrants keeps wages in this bottom range peculiarly low in the United States.

\* \* \* \* \*

"And it is their daughters who constitute the great army of women workers competing for employment in factories and shops. The wages which the parents get attract them in great numbers to the United States; the wages which the young women get attract them in great numbers to the shops and factories. The multitude which thus bids for employment in the entire field brings about current rates of remuneration which serve on the whole to 'clear the market.' Rates distinctly higher would cause more applicants to offer their services, and would cause less to be employed.

The economic theory of the case is simple; the only effective remedy for the low wages of a particular class of workers is a decline in the numbers offering themselves for the particular sort of employment."

The result, as Professor Taussig says, of a statutory minimum wage is non-employment:

"What would happen if legislation should try to apply to the wages of *all* women a minimum of say \$8.00 a week—the sort of standard rate that is commonly proposed?

"The answer to this question on general reasoning would seem clearly to be that not all the women would continue to be employed. The numbers offering their services in the market would rise; it is a peculiarly elastic kind of labor supply. On the other hand, the number demanded in industry at the higher rate would be less. The more efficient (or more tractable) would be culled out and first employed. Others, of the common run, would be retained in certain operations for which they were serviceable and profitable even at the higher rate. But there would be a residuum—how large a proportion, it is impossible to say, but doubtless considerable—not employed at all."

And Professor Taussig concludes as follows:

"The preceding discussion seems to justify a warning that there is need of going slow in the regulation of women's wages. More particularly there is need of caution in applying as the standard for determining all wages, the amount needed by the independent women. The 'parasitic' interpretation of the situation is unwarranted. The women workers are not a drain on their families or on other industries, or on the community at large. It is precisely at this point that the campaign now being carried on in the United States is vulnerable. I cannot but believe that an attempt to apply on a sweeping scale the principle of abolishing 'parasitism' must before long break down in practice. The real question is not whether the young women fail to contribute anything to their families or to the national dividend—they do contribute—but how their contribution can be made larger and how they can secure a larger share of the national dividend. The plain facts of the situation must be faced. The immense majority of women who work in factories and like employments do *not* need as a minimum any such wages as the commissions now at work are asked to prescribe. To prohibit their employment except on this basis—to require that every

woman at work should receive some such sum as \$8.00 a week—would not bring about the employment of all at any such rate, but a reduction of the number employed and a failure to attain the desired end.”

## IV

### “Preponderant Opinion”

It is now nearly six years since the question of the extent of the police power of the state was discussed by the Federal Supreme Court in the case of *Noble State Bank v. Haskell*. Since then, two sentences, picked out of that decision and disconnected from their context or application, have been quoted as supporting every extreme theory repugnant to the fundamental principles of our constitutional system of government. They have been the solace and plaything of visionaries. They have been put forward as authoritative support, from the highest judicial tribunal, of every political vagary which has been advanced since they were uttered. From them the socialist claims not only justification for his creed, but also a promise of the effective accomplishment of his ends, and this, too, by the instruments by which he has said he would work out those ends; because, under his construction, they would compel all constitutional protection to property to yield to the forces of a “preponderant opinion.” The pseudo-reformer who confounds change with progress cites these excerpted sentences as authority in favor of his proposition to do away with all constitutional safeguards and to turn every judge and every judicial decision over to the arbitrary caprice of a temporary majority. Every possible change in the administration of the law or in

our system of government is advanced not only as justifiable, but as feasible and consistent with constitutional law ; because, as it is alleged, these excerpts extend the limits of the police power as theretofore established and make the police power of the respective states, without limit, paramount to every other constitutional consideration.

In the same way they are cited by advocates of the constitutionality of the minimum wage statute as involving a new doctrine with regard to the police power in accordance with which all objections to the constitutionality of that statute are overcome. (Report Massachusetts Commission on Minimum Wage Boards, 1912, page 24 ; and "Minimum Wage Legislation," by John A. Ryan, Catholic World, February, 1913).

These sentences are, in the words of Justice Holmes, who wrote the decision (*Noble State Bank v. Haskell*, 219 U. S. 104, 111) :

"It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

What Justice Holmes said in the Oklahoma Bank case was no new doctrine of the police power, nor a rule extending any former doctrine. As he protests (in his opinion denying reargument ; 219 U. S. 575, 580) :

"The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power."

In a former case the Supreme Court, speaking through Justice Brewer, had said what was intended to be the same, and to have the same application, as was stated by Justice Holmes in the Oklahoma case. With reference to the claim that a woman's peculiar physical structure and duties would make an employment in which she is required to stand for long hours



hazardous and peculiarly hazardous to her as a woman, Justice Brewer had said (*Muller v. Oregon*, 208 U. S. 412, 420-1) :

“The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.”

There was no new principle and no extension of former principles announced nor intended to be announced in the *Oklahoma Bank* case. The question there was, as to the police power of the State of Oklahoma to regulate banking within the state and to provide guaranties under the authority of the State and under its direction against the insolvency of banks organized, maintained and operated with the sanction and under the authority of the State. It was held that the compulsory assessments, for the purpose of making up the guaranty fund, provided to be paid by the various banking institutions were, under all the circumstances, within the police power of the State.

There is absolutely nothing in that case from which it can be argued that it is within the police power of a State to compel the payment of a minimum wage in connection with employment in any occupation, without distinction as to kind, and especially when the basis of the attempted exercise of the

police power is merely a personal need,—having no relation to the occupation or employment itself,—of the employee.

While not controlling, the inquiry is here proper, whether the Minimum Wage Statute is one which is “put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.”

We have already outlined the economic objections and the opposition of representative public men, based upon such economic objections. One of these is a recognized statesman, now President of the United States. Besides others, we have cited the opinion of one who is so situated as to speak from experience, from scientific study and as an authoritative representative of labor. These are men, who in their respective spheres, have made a study of the question from its economic and political viewpoints, as well as from the viewpoint of public policy.

We have outlined the views of the British expert, Aves, whose conclusions are based upon an extended official expert investigation. We have also noted the conclusion of the only deliberate official investigation of the question which has been made by any official body in the United States, the Massachusetts Commission on Minimum Wage Boards, which led to the adoption in the State of Massachusetts of an indirectly compulsory minimum wage. It is significant that the only directly compulsory minimum wage statutes were all passed by the Legislatures of 1913: Oregon (Chapter 62, Laws of 1913); Washington, (Chapter 174, Laws, 1913); Colorado, (Chapter 110, Laws of 1913); Wisconsin, (Sections 1729, s-1 to 12, Statutes 1913; Chapter 712, Laws, 1913); Minnesota (Chapter 547, Genl. Laws 1913); California, (Chapter 324, Statutes 1913); and Utah, (Chapter 63, Laws of 1913).

The only exception is the Arkansas Statute of 1915, (Chapter 191, Laws 1915).

In the year 1913 also was passed the Nebraska Minimum Wage Statute (Chapter 211, Laws 1913), which followed the

so-called "non-compulsory" statute of Massachusetts which had been passed in 1912 and which was further amended in 1913 (Chapter 706, Acts of 1912, as amended by Chapters 330 and 673, Acts of 1913). These statutes are discussed more in detail in the next subdivision below,—“Minimum Wage Legislation in the United States.”

With the possible exception of Massachusetts, these were the same legislatures which showed, by other enactments and by proposals for constitutional amendments, that their attitude toward economic and constitutional questions was controlled by the wave of extremism and radicalism which at that time was altogether too prevalent. Constitutional measures which those Legislatures, or many of them, proposed for adoption by the people, have since been discussed, deliberated upon, and have been demonstrated to be repugnant to the existing prevalent opinion of the electorate of those States. The Judicial Recall Amendment, which was proposed by a very large majority in the 1913 Legislature of Minnesota, was repudiated by the electorate of that State in the election of 1914. So with the Recall Amendment in Wisconsin, the Initiative and Referendum in Minnesota, and, indeed, most of the amendments which were voted upon in these States under proposals adopted by the Legislatures of 1913.

The fact that several State Legislatures have already enacted it, is not, therefore, any support for the claim that the compulsory Minimum Wage is demanded or favored by a prevailing public opinion. The extent of the existence of such statutes, is, nevertheless, an interesting fact, to be taken into consideration, however, only in connection with other facts.

#### MINIMUM WAGE LEGISLATION IN THE UNITED STATES

Minimum wage legislation in the United States has been confined to the following states, under acts in the years designated:

Massachusetts (1912); Nebraska (1913); Arkansas (1915); California (1913); Colorado (1913); Oregon (1913); Utah (1913); Washington (1913); and Wisconsin (1913). In 1915, also, Idaho provided for a Commission to investigate the question, but has not passed any minimum wage statute.

With the exception of the statutes of Massachusetts, Nebraska, Arkansas and Utah, these minimum wage statutes are all substantially in the terms of the Oregon statute here in question. All these statutes purport to be based upon the police power of regulation of occupations in the interest of "public welfare, safety, health and morals." In each case, their concrete object is to provide for women workers a wage which shall not be less than that which is considered required to supply each female worker, as an independent supporter of herself, such full "living wage" as will keep her in "health and comfort." Every statute bases its exercise of police power regulation on the claim that the supplying, to a citizen who happens to be an employee in any particular occupation, of the needs of such citizen as an individual for a comfortable living makes the occupation in question "affected with a public interest," and, therefore, subject to the wage regulation in question.

In only three states, other than Oregon, has an attempt been made to enforce the minimum wage features of these statutes. Therefore, in showing existing legislation, we will first take up those three States.

### *Massachusetts*

The Massachusetts statute appears as Chapter 706, Acts of 1912, and Chapters 330 and 673, Acts of 1913.

The Massachusetts statute authorizes a Commission to investigate and determine the wages of female workers in any industry or occupation which are necessary to supply to such workers the cost of living and to maintain the worker in health. The Commission has the same power as to the wages of all

learners or apprentices (of either sex), and of all minors below 18 years of age (of either sex). The wage so found is not directly compulsory upon the employer; that is, there is not fine or imprisonment for failure to pay that wage.

The penalty upon an employer for not paying the prescribed wage is, that the Commission publishes the recalcitrant employer in newspapers, and the publication of such official list is made compulsory upon the newspapers. The only remedy allowed the employer is, that he may come into court and assume the burden of proof in showing that the prescribed wage is such as not to leave him a fair profit. If he is successful in so showing then the court may restrain the Commission from the publication provided. The remedy is individual to each employer.

In theory this Massachusetts statute provides a method of coercion. The method was intended to obviate the constitutional objections which we here raise to a directly compulsory statute. In its practical application, it is more repugnant to the business sense of the community, as well as to established law, than the apparently more drastic statutes of Minnesota and Oregon. This could not as well now be said of the Massachusetts statute as a year ago, before its viciousness had been demonstrated by practice. The state commission and its wage boards become mere instruments for carrying out the demands of the employees. In terms, the statute affords employers a hearing upon the question of the reasonableness of the wage fixed and of their ability to pay. In practice, all such considerations are cast aside, including evidence of facts, except in so far as they accord with the preconceived notion as to what the wage should be in order to give to the employees all that they demand, and to take from the employers irrespective of their ability to pay. If an employer fails to pay the wage fixed, he is published throughout the state. The statute makes it a crime for any newspaper publisher to refuse thus publicly to blacklist an employer. He may be compelled thus publicly to

hold up to censure his own relative, or his best paying advertiser—or even himself. Such a statute holds over every employer the threat of an official public blacklist and boycott, more severe and more damaging than any private boycott ever established.

Again, in practice, the Massachusetts statute results in discrimination. Its wage boards and commission fix different wages for different occupations, and even for different classes of employees in the same occupation. As the wage is fixed irrespective of the earning capacity of the employee, and is theoretically based upon the *individual* cost of living, then why has one worker a right to a living wage greater than that of another? The fact is that, although theoretically computed upon the basis of a living wage, it is not computed at all. It is simply fixed for each class, from time to time, as the various boards are influenced by the demands of the employees. Moreover, each wage, when fixed, is only a stepping-stone to a higher wage. Each class of employees is constantly seeking an increase, regardless of any basis of computation, and particularly regardless of the worth of the employee to the employer.

The results of the application of the Massachusetts statute have justified the objections to such legislation based upon economic as well as on constitutional grounds. The first industry in the United States to have applied to it the statutory minimum wage was that of the brush making industry in Massachusetts, in which, from its very nature, an unusually large number of unskilled workers are employed. One brush concern, after the minimum wage for brush makers took effect, discharged over one hundred of its unskilled employees. Then it reorganized its methods of work so that the less skilled labor is done by those who also perform more skilled work. The total wage, however, is \$40,000 a year less than that paid before. Many other of the brush concerns in Massachusetts discharged a large number of their employees who were incapable

of earning the wage fixed. An investigation six months afterwards showed that two-thirds of the workers so discharged had not since been able to get employment in any line of work at any price, and that many were engaged in other employments where a minimum wage was not yet fixed, and were receiving less than when discharged from their work as brush makers. (See Bulletins Mass. Minimum Wage Commission, and Annal Reports same Commission; also, "The Minimum Wage—Massachusetts Experience," published, Boston, 1916, Merchants and Manufacturers of Massachusetts). The Massachusetts courts are now holding their decision as to this statute's constitutionality waiting this court's decision in these cases.

### *Minnesota*

The Minnesota statute (Chapter 547 General Laws 1913) prohibits any employer from employing any "worker" at less than a "living wage." "Worker" is defined to mean a "woman \* \* \* employed for wages"; that includes, also, minors (of both sexes), a woman or minor learner, and a woman or minor apprentice. "Living wage" is defined as "wages sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."

In Minnesota a Commission was formed and proceeded to put the statute in operation, but was enjoined by the courts in a decision holding the statute unconstitutional (See decision of Judge Catlin, Ramsey County District Court, in the cases of *A. M. Ramer Company v. Eliza P. Evans, et al*, and *Williams v. Eliza P. Evans, et al.*, set forth in this brief above, pp. 67-9). This decision was filed November 23, 1914, and is now in the Supreme Court of Minnesota, on appeal, having been argued and submitted, but held for decision awaiting decision of this court in these Oregon cases.

### *Arkansas*

The Arkansas statute (Act 191, Laws 1915) fixes the mini-



minimum wage in the first instance directly, instead of through a Commission. It provides:

"Sec. 7. It shall be unlawful for any employer of labor mentioned in Section 1 of this Act (manufacturing, mechanical or mercantile establishment, laundry, or express or transportation company) to pay any female worker in any establishment or occupation less than the wage specified in this section, to-wit, except as hereinafter provided: All female workers who have had six months' practicable [practical] experience in any line of industry or labor shall be paid not less than \$1.25 per day. The minimum wage for inexperienced female workers who have not had six months' experience in any line of industry or labor shall be paid not less than \$1.00 per day."

Section 9 provides that females who are paid upon a piece work basis, bonus system or in any other manner than by the day, shall be paid not less than the rate hereinafter specified for the female employees who are working on the day rate system.

A Commission is provided which after investigation may raise or lower the statutory rate so fixed, and establish a rate which "is adequate to supply a woman, or minor female worker engaged in any occupation, trade, or industry, the necessary cost of proper living, and to maintain the health and welfare of such woman, or minor female worker."

Failure on the part of any employer to pay the rate so fixed is punishable by a fine of not less than \$25 nor more than \$100 for each day of noncompliance.

This Arkansas statute has been declared unconstitutional by the lower courts of that state and on appeal the question is still pending in the Arkansas Supreme Court. (*State of Arkansas, appellant, vs. J. B. Crowe, appellee*, submitted, 1915).

### *Nebraska*

The Nebraska statute (Chapter 211, Laws of 1913) substantially follows that of Massachusetts.

*California*

The California statute (Chapter 324, Statutes 1913) fixes the minimum wage as "the necessary cost of proper living and to maintain the health and welfare of such women and minors." It is generally on the lines of the Oregon statute.

*Colorado*

The Colorado statute (Chapter 110, Laws of 1913) applies to "any mercantile, manufacturing, laundry, hotel, restaurant, telephone or telegraph business." The minimum wage is fixed on the basis of what is adequate "to supply the necessary cost of living, maintain them in health and supply the necessary comforts of life." This statute is generally on the lines of the Oregon statute.

*Washington*

The Washington statute (Chapter 174, Laws 1913) prohibits employment of women workers "at wages which are not adequate for their maintenance" and authorizes the establishment of a minimum wage such "as shall be held to be reasonable and not detrimental to health and morals and which shall be sufficient for the decent maintenance of women."

*Wisconsin*

The Wisconsin statute (Sections 1729, s-1 to 12, Statutes 1913; Chapter 712, Laws 1913) prohibits less than "a living wage", to any female or minor employee; which is defined to mean compensation by time or piece work or otherwise "sufficient to enable the employee receiving it to maintain himself or herself under conditions consistent with his or her welfare."

*Utah*

In Utah (Chapter 63, Laws 1913) the Wage Commission feature of other state statutes is entirely eliminated, and the statute briefly and directly makes it unlawful to employ females at less than a specified rate for minors, another specified rate for adult learners and apprentices, and another specified rate for experienced adults. There is no distinction between different class of employments, and a breach of the law by any regular employer is made a misdemeanor.

*Idaho and Ohio*

There are no minimum wage statutes in either Idaho or Ohio. But in Idaho the legislature of 1915 (Chapter 136) provided for a Commission to investigate the question of minimum wages. In Ohio in 1912 there was adopted a constitutional amendment authorizing laws establishing minimum wages.

## MINIMUM WAGE STATUTES IN OTHER COUNTRIES.

The legislative wage is not a new idea. It appeared first in the form of a maximum agricultural wage at several periods in the early history of England. These maximum wage statutes were the outcrop of the oppression of the lower classes, and particularly laborers, and in favor of the landed interests, which was indulged in from time to time by Parliaments not sufficiently representative of the common people. They were of the same unscientific class as statutes regulating the prices of land, of flour, of fuel, and of other necessities of life.

Until comparatively recent times there have remained upon the statute books of England, certain ancient statutes which have become obsolete, but which are the remnants of the once interfering hand of the legislature in respect of private contracts of sale. One of these is the statute fixing the maximum

price of labor, and imposing upon all the legal obligation to work for anyone who demanded service (The English Statute of Labours, of 1349). An English act of 1350 compelled laborers to stand for hire in open market and to serve at not less than maximum prices, and also prohibited departure from the country. In 1562, another statute required all able-bodied persons between certain ages to work for anyone demanding their services, and empowered justices-of-the-peace and sheriffs in each county to fix and limit the wages to be paid; and the same statute also fixed the minimum hours for labor.

Referring to these statutes, as well as to the modern minimum wage statutes, the Supreme Court of Indiana recently said (*Street v. Varney Electrical Co.*, 160 Ind. 338) :

“In the very nature and constitution of things, legislation which interferes with the operation of natural and economic laws defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions.”

From the beginning of the nineteenth century, English labor statutes have been framed for the protection of the laborer. These include the factory acts promoting safe and sanitary conditions for labor, limiting the hours for dangerous or unhealthy occupations, and the acts for workmen's compensation in case of casualty, and other measures, many of which in form or in spirit have become or are becoming statutory measures in this country.

In America the Continental Congress, on November 22, 1777, in order to remedy the disadvantages of the depreciated currency, passed a resolution providing for the appointment of commissioners from the different states to regulate the price of labor, manufactures and produce; and in 1778, the New York legislature passed an act fixing the wages of labor and the prices of many articles of merchandise and even the profits of traders and vendors. In 1776-7, on the recommendation of a

committee representing the New England states, many of those states adopted statutes fixing the maximum prices of labor and of wheat, salt, sugar, molasses, shoes and of many other articles of merchandise. All such statutes were found unenforceable as a practical matter, although constitutional protection of the liberty of contract and of the right of private property was not then alone sufficiently preventive of the enforcement of such legislation.

The statutory minimum wage, however, is a modern idea. It first appeared in Belgium in 1887 in the form of a minimum wage statute for laborers employed in public work. This, as we have seen, is far different, upon both economic and constitutional grounds, from legislating a minimum wage for private employment. In jurisdictions with constitutions, limited or unlimited, the power of the State has generally been recognized, to legislate as to the terms of labor contracts in which the State itself or any of its municipal subdivisions, arms of the State, should be a party.

The first legislative minimum wage applying to private employment was adopted in Victoria in 1896 and was soon followed by similar statutes in other Australian provinces and in New Zealand, and has been in force in England since January, 1910 (The Trade Boards Act, 9 Edw. VII, Chap. 22, adopted Oct. 20, 1909; Report Massachusetts Commission on Minimum Wage Boards, 1912, pages 14-161; Annals of Academy Political and Social Science, July, 1913, "The Minimum Wage as a Legislative Proposal in the United States," by Prof. Lindsay, pages 45-46, and "The Minimum Wage in Great Britain and Australia," by Prof. Hammond, pages 25-26). These Australian and English acts applied to both male and female employees. It should be kept in mind that there is no constitutional limitation of the power of Parliament in such matters. When Parliament has determined the question of the expediency of a policy, its expression in statutory form becomes both the statute and the constitution. The English Par-

liament had the benefit of the experience of New Zealand and the Australian provinces, and also of the special investigation and report by the British expert, Aves, upon the results, theoretical and practical, of such legislation in Australasia. As already shown, his report was that the real practical benefit of these statutes was to promote voluntary co-operation on the part of the employer (Report Massachusetts Commission on Minimum Wage Boards, June, 1912, page 14); and that the conclusion was not then (in 1909) justified that the recommendations of any special wage board should be made legally binding in a country like England, or that such power, if granted, could be effectively exercised. He deemed these attempts in the Australian provinces and in New Zealand as yet mere experiments even in those countries, and that their apparent success was due to the prevalence of good times since their adoption, and to the fact that they applied to a small, centralized government, and were limited to only a very small number of workers, and thereby presented much less and entirely different difficulties of application from those which would be confronted in a country like England or the United States ("The Legal Minimum Wage," by James Boyle, Forum, May, 1913). England, therefore, proceeded cautiously, and the act of 1909 was applicable to only four trades in which much sweating existed, and it was also extended to all workers underground. The English statutes must still be considered experimental. They are being applied by thoroughly organized wage boards, but dissatisfaction is expressed, not so much as to the rate of wages established, as to the system of the minimum wage, and not only by employers, but by employees.

The adoption of a minimum wage in this country beginning with the Massachusetts act of 1912 was borrowed as was other labor legislation from England. It is obvious that the fact of the adoption of such legislation by England and even of its practicability and enforcibility in that country would not be conclusive of its practicability or enforcibility in this country.

Its attempted application here is confined by the statutes to females and minors, in order to make its proposed beneficiaries within a class sufficiently distinctive for the basis of some argument in favor of justification for such legislation under the police power of the state. This is on the theory that women and minors are generally, as a class, weak in bargaining power, and peculiarly entitled to the protection of their health and morals through paternalistic legislation which could not be enforced here as to male adult workers (Annals American Academy Political and Social Science, July, 1913: "The Minimum Wage as a Legislative Proposal in the United States," by Samuel M. Lindsay, Professor of Social Legislation, Columbia University; also, "The Minimum Wage in Great Britain and Australia," by Matthew B. Hammond, Professor of Economics and Sociology, Ohio State University).

#### TEMPORARY PUBLIC IMPRESSION AS AGAINST SEASONED PUBLIC OPINION.

The "public opinion" which is to sanction or justify the exercise of the police power, is too often mistaken as indicated by what is merely the temporary public impression. As to any measure, even if a preponderant majority of all voters should for the time demand its passage and, after its passage, demand its enforcement, such fact does not constitute a justification for the measure in question. Measures of public interest and great decisions of the courts are often viewed in opposite ways, between one period of time and another. Experience has shown that, while temporary public impression may be vacillating and erroneous, the public opinion which is formulated after experience, deliberation and enlightenment, generally settles itself upon correct lines. Public impression, enlightened by time and consideration, evolves into the season-



ed public opinion the deliberate conviction of the people; it then becomes the prevailing morality, the preponderant opinion, to which courts give consideration, but nevertheless not unduly, in their decisions as to the constitutionality of legislation ostensibly enacted for the public welfare and put forth as measures justified by the police power.

There is not today any substantial prevalent public opinion either demanding or favoring a compulsory minimum wage in private employment as a public welfare measure, either through the exercise of the police power or otherwise. The only two political parties which are now left are united in their opposition to such measures and their objections are based not only upon constitutional grounds, but upon economic objections and upon public policy. The only parties which as organized political bodies or which through their representative leaders have advocated the minimum wage, are the Socialist Party and the Third-Term Party. The recent elections have brought from the people of the nation a refutation of the vagaries of those parties and of their leaders. This statement is not to inject politics into this argument. It is to emphasize the fact that hue and cry for the extension of the police power is coincident with, and a part of, the tendency to eliminate constitutional safeguards; and that this tendency, at present too apparent, is only local and temporary, and that it is not indicative of the existence of that "preponderant opinion" which is worthy to be taken into consideration by the courts.

The decision of the Oregon Supreme Court here in question cites the opinion of certain writers, most of them obscure, in favor of the minimum wage. These are all opinions based upon the purely ethical view of the question. They mistake a purely philanthropic, altruistic duty for an obligation which may and should be enforced by statute, regardless of any economic or constitutional objections. Most of such views are urged without any consideration of the proper scope or limits of legislative power.

## Conclusion

The Oregon Minimum Wage Statute has the effect: (1) to create an arbitrary and unjustified discrimination (a) between employers of the same class and (b) between employees of the same class; (2) to deprive both the employer and the employee of the liberty to contract; (3) to take the property of the employer for the benefit of other persons, either for their benefit as individuals or for the general public benefit thereby accruing, and to destroy his profits and business; and (4) to deprive the employee of employment and means of subsistence.

The Statute, therefore, has the effect, as against the Plaintiffs in Error, and each of them, to abridge their privileges and immunities as citizens of the United States, and it deprives them of their liberty and property without due process of law and denies them the equal protection of the laws, contrary to the XIVth Amendment of the Federal Constitution.

It is not necessary to argue further in detail that the Statute has all the effects just stated. As heretofore shown, in the summary of the complaints which present the facts in these cases and in the summary of the decisions of the State Supreme Court, it is stated, without dispute in these cases, that the Statute has, against these Plaintiffs in Error, and each of them, the effect to violate each of these prohibitions of the XIVth Amendment. But the decisions of the State Court, sustaining the validity of the Statute, are based on the police power of the State, the exercise of which, in proper cases, it is recognized may have the effect, indirectly or in some instances directly, to conflict with private, personal or property rights.

It should be kept in mind, however, that these discriminations and damage to personal and property rights, arising out of the enforcement of such a law, are not merely theoretical but are serious and may be disastrous to the business or industry af-

affected.

As already shown, the enforcement of such a statute, by raising the normal expense account of the employer affected, creates a discrimination against him and in favor of other employers in the same occupation, situated not only in other localities of the State, if the rates fixed vary in different localities, but also in favor of his competitors located outside of the state where no such law, or where a different rate under a similar law, is enforced. There results a tendency to depress an industry in one locality as against a similar industry in other localities, or in one state as against similar industries in another state. The depression may be only to the extent of a diminution of profits. But it may, and in many cases probably would, extend to an entire deprivation of profits, and therefore the closing out of the business or industry affected. Employers whose expenses are thus increased cannot recoup themselves by a rise in prices, because of competition in localities where business is not similarly affected. If such difficulties were overcome by a uniform minimum wage law, co-extensive with the markets controlling the prices of the product in question, then the cost of living tends to increase and at the same time, of course, the standard by which the minimum wage is computed also rises, with no resultant benefit to the wage earner. The legislative regulation of wages necessarily leads to a legislative regulation of prices.

An arbitrary discrimination is also created between the employees themselves, without any legal basis for the distinction made in the classes of employees, in the application to labor of the minimum wage. As we have seen, there can be given under the Oregon statute, no consideration to the experience, capacity or ability of the different employees to whom the minimum wage is applied. The basis of computation must be the same for all classes, and the standard of living must be taken as the same for all. No allowance can be made for the value to the employee of the opportunity for

practical instruction; she is deprived of any wage until she shall reach the efficiency measured by the wage fixed. As we have seen, also, the result in any occupation will be to eliminate from employment all those whose efficiency is not proportionate to the minimum wage; for no employer can be compelled, and could not be expected, especially under vain threats of official compulsion, to pay for labor more than it is worth.

As we have already seen, another resulting tendency is to make the minimum wage established also the maximum wage. At the same time that lower wages are artificially and by compulsion brought up to a minimum standard, the inevitable result is to make the wages above the minimum remain stationary, or be diminished to or towards the minimum. Such difficulty can be obviated only by the fixing of wages for all classes of labor, both minimum wages, and those above the minimum. This, of course, cannot be accomplished by legislative enactment, although it has been done in certain occupations through the co-operative agency of trades unionism. The legislative minimum wage is antagonistic to trades unionism, and by that we mean to the features of trade unionism which are generally recognized as proper and efficient.

The Supreme Court of the United States must at some time, and very soon, set precisely the limits beyond which the police power of the State cannot be constitutionally exercised in regulating hours of labor. It will also rest with this court to set the limits for the exercise of the police power of the State in regulating prices, not only of labor in private employment, but of all other commodities in private transactions of trade and commerce. It is only the limits so fixed by the courts which will be regarded by legislatures. There is an increasing tendency on the part of legislatures, Federal and State, to disregard or to attempt to circumvent constitutional limitations. A local or temporary public impression is formulated over night into a statute. Indeed, as in the cases of these minimum wage statutes, many statutes palpably repugnant to constitutional

limitations are hastily put through the legislature of a state without any consideration on the part even of the legislators of their constitutionality or if any such consideration is given, they are put through in defiance of constitutional considerations, in order that the authors of such statutes may curry favor with their constituents. Those legislators who fall into line in favor of the statute generally do so on the theory that it will be easier to explain to their constituents a vote in favor than it would be to explain a vote against. Moreover, such statutes, as in the case of these minimum wage statutes, are passed by legislatures without any demand of public opinion. It is safe to say that not five per cent of the voters of the States whose legislatures passed minimum wage statutes in 1913, ever gave any consideration to the subject until after the legislatures adjourned and they found that such a statute had been passed.

In this and similar ways, the tendency of the modern legislator is toward an almost reckless disregard of constitutional limitations. He shirks the responsibility of gauging legislation by the rule of the Constitution and puts that responsibility entirely upon the courts. In many cases the object of the legislator has been accomplished by the mere passing of the statute. He has made a record; and in many cases his selfish object is promoted, rather than otherwise, when his statute is afterwards declared by the courts to be invalid. He then poses as a champion of the "oppressed" and tries to accumulate further political capital by prating about a "Government by Judges" as a system of oppression.

This tendency on the part of legislators to disregard their expressly limited powers has been rebuked by the Federal Supreme Court. In the case of *Knobville v. Water Company*, 212 U. S. 1, 18, this court said:

"The Courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system

rests largely upon the sanctity of private property, and that State or community which seeks to invade it will soon discover the error in the disaster which follows."

This minimum wage statute is one of those "errors," referred to by this court, which, if sanctioned by the courts, will lead to disaster; for logically the right of the legislature to fix prices for labor in private employment must establish the principle by which the legislature may fix prices of all commodities. Furthermore, if it can fix a minimum wage it can also fix a maximum wage.

It could be held more consistently that the legislature has the power to fix maximum hours as to private employments and as to all classes of workers, men and women, than it could be held that the legislature can fix minimum wages for women in private employment. The first step, which, as this court has held, was along lines consistent with the constitutional exercise of the police power, was the establishment of the power to fix maximum hours in private employment in occupations of such a character as made greater hours dangerous. Next, maximum hours for women were allowed to be fixed in certain occupations where the dangers of greater hours were peculiar to women. This is as far as this court has gone. It will soon be asked to declare, as a principle of constitutional law, that the legislature under its police power may fix maximum hours for women in all occupations, irrespective of character. It will then be asked to extend the fixing of maximum hours to men in all private occupations.

Under the limitations of the police power of the State, as already declared by this court, the fixing of maximum hours in all occupations and for all workers, men or women, would not be within the constitutional limits of the police power of the State. But even if such extension of the police power should be made, the principle established would be far different in kind and much less far-reaching than the principle involved in a mini-

minimum wage statute for any class of workers. If once it be held that the police power of the State extends to the fixing of a minimum wage for women, whether in a limited class of employments or in all occupations, there will be no logical objection to the constitutionality of a statute fixing prices. It is now claimed that the fixing of maximum hours, for instance for women, is inadequate for their protection, unless it is accompanied by the power to fix a minimum wage for the same class. The fixing of a minimum wage, as has been shown above, increases the cost of production and must inevitably, to some extent at least, result in an increase of prices. But the increase of prices increases the cost of living and the cost of living is the basis of a statutory minimum wage. As soon as it is established as a proper statutory measure, it will be claimed that the minimum wage is inadequate to furnish the protection intended by it unless it be accompanied with the power to regulate prices, and that, as the statutory minimum wage is a regulation of the price of one commodity, there is no reason for denying the right to regulate the price of any other commodity.

If the right of the legislature to establish a minimum wage in private employment is upheld, there can logically be no limit to the extent to which the legislative power may interfere with competition and with the conduct of all private business.

It is obvious, without further argument, that the well recognized personal privilege and liberty of contract, both of employee and employer, are diminished by the enforcement of the minimum wage statute. The resulting disadvantages are altogether, we believe, to the employee, more than to the employer; but the fact that either of them is thereby prejudiced is sufficient to require a holding by the courts that the statute is void, unless it can be held as a proper exercise of the police power.

Manifestly, the enforcement of such statute has the effect to compel the private employer to contribute money for the benefit of others, whether these others be regarded as individuals or



the general public. It results in an arbitrary assessment upon the employer for the benefit of others.

This, and other effects of the law, including those already discussed, make it repugnant to constitutional prohibitions; because no theory of the police power can warrant its enforcement by the courts. This lack of warrant for claiming the power to enact and enforce this sort of legislation has already been shown.

There is no attempt in this discussion to controvert the theory advanced upon an ethical basis, that every employee has, as a part of his generic right to exist as a person, the natural and moral right to be furnished with sufficient sustenance to maintain life and to maintain him in health and reasonable comfort. This, however, is far from admitting that that natural right of his to receive either proves, or tends to prove, a corresponding duty on the part of one who happens to be his employer to furnish all that sustenance and means for life, health and comfort, or any part of it, except in so far as healthful and comfortable conditions of work, while employed, are concerned.

The forces of the inexorable law of supply and demand and of other natural economic laws, cannot with impunity be defied by the legislative fiat of man. Relief from their effects may be achieved, and to a large degree they may be overcome, by co-operative organization. Such co-operation may be promoted by proper constitutional measures; but the efficacy of any legislative enactment relating to a minimum wage is not so much from its compulsory features as it is from its encouragement and assistance to the co-operation of those more benevolently inclined or having a higher ethical sense.

A compulsory legislative minimum wage necessarily results in such disarrangement of the conditions of labor, trade, commerce and industry, that the evils resulting require greater remedial agencies for reform than are comprised in any reform attempted through the minimum wage itself. The State has no

right to inject such disturbing elements as the compulsory minimum wage into the social and industrial life of its citizens, unless and until it has provided in advance the remedies for the resulting evils. It must provide for the army of lower wage earners who are thereby rendered jobless. It must provide special education for the occupations to which the minimum wage is to be applied. It must raise and maintain the lower class of laborers to the standard of efficiency established by the minimum wage. It must prevent, by stricter immigration laws, the influx into the labor markets of this nation of a continuous stream of incompetents. Until such immigration restrictions are established, no remedy for the evil conditions resulting from the legislative defiance of the natural law of supply and demand can be adequately provided.

The compulsory legislative minimum wage, particularly as contemplated by the Oregon statute of 1913, is not only inadvisable, because it is impracticable and unworkable, and because it is inimical to the interests of both employees and employers; but it is also unconstitutional and cannot be enforced against those employers who do not choose voluntarily to submit to the proceedings taken under it.

The police power of the State is not a sufficient basis for such legislation. The regulation of hours or even of wages in public work has no relation to the question, because such regulations are supported upon a basis entirely apart from that of the police power. The decisions sustaining those restrictions upon private employment which have been sustained in the case of particular employments in connection with particular classes of employees, with the distinction between employments which are hazardous and those which are not, and the distinction as to those which are hazardous to women, although perhaps not to other classes,—all these decisions show that the legislative minimum wage in private employment cannot be based upon the police power.

As already pointed out, the need of the employee in question,

which it is made the duty of the employer to supply, is a need which *does not arise out of the occupation in question, nor out of the connection of the employee in question with that occupation.* It is a need which exists independently of the occupation; because the need of an income sufficient to sustain life in health and comfort is a personal need, and not a need arising from the capacity of employee. Even if we assume that there is a natural moral right to have that need supplied, still, the duty to supply it does not rest and cannot be made to rest, as a legal duty, upon the employer.

There are, therefore, lacking the elements upon which to base any such legislation. While the subjects of health, morals, comfort, and general social welfare, are, generally speaking, the subjects out of which arise the right of the State to exercise its police power in legislation, nevertheless, as has already been shown, the mere insertion in an act of the statement that its purpose is to promote health, morals or comfort, or any other elements of social welfare, does not bring the act within the police power of the State. Neither does the mere fact suffice that the results obtained by the act would, in themselves, be promotive of the health, morals or comfort of the beneficiaries for whose advantage the act is intended. In order to impose upon a particular occupation or a particular employer the compulsory burden of contributing, either directly or indirectly, to his employee, whether by concessions or by cash payments, for providing for his health, morals or comfort, it must appear that the object sought to be accomplished by the act has some "real, substantial relation" to the occupation of the employer in question or to the employment in question. There is no such source or relation in the cases now under discussion; for the need which is sought to be supplied *does not arise from or in connection with the employment.* The fact of employment, therefore, cannot be made the basis of compelling the employer to supply that need.

The Oregon Statute here in question, so far as it established or authorizes the establishment of a compulsory minimum wage in private employment, is an attempt to exercise the legislative power of the State beyond the constitutional limits of the police power.

The Judgments of the Supreme Court of the State of Oregon here in question, and each of them, wherein that State Statute is held to be valid, as against the contentions of the Plaintiffs in Error herein, should be reversed.

Respectfully submitted,

ROME G. BROWN,  
*Attorney for Plaintiffs in Error.*

# Appendix

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Containing the following, all referred to in the foregoing brief:

- I. Extracts from the State Constitution of Oregon.
- II. Chapter 62, General Laws of Oregon for 1913.
- III. Opinion of Supreme Court of Oregon in the *Stettler* case.
- IV. Opinion of Supreme Court of Oregon in the *Simpson* case.

## I

**EXTRACTS FROM THE STATE CONSTITUTION OF  
OREGON**

**Article 1, Section 10.** No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.

**Article 1, Section 18.** Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in case of the state, without such compensation first assessed and tendered.

**Article 1, Section 20.** No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

**Lord's Oregon Laws, 1910, Volume 1, pages 75, 79 and 80.**

## II

**CHAPTER 62, GENERAL LAWS OF OREGON FOR 1913**

**AN ACT, To protect the lives and health and morals of women and minor workers, and to establish an Industrial Welfare Commission and define its powers and duties, and to provide for the fixing of minimum wages and maximum hours and standard conditions of labor for such workers, and to provide penalties for violation of this act.**

**Whereas, the welfare of the State of Oregon requires that women and minors should be protected from conditions of labor which have a pernicious effect on their health and morals, and inadequate wages and unduly long hours and unsanitary conditions of labor have such a pernicious effect; therefore, *Be it enacted by the People of the State of Oregon:***

**Section 1.** It shall be unlawful to employ women or minors in any occupation within the State of Oregon for unreasonably long hours; and it shall be unlawful to employ women or minors in any occupation within the State of Oregon under such surroundings or conditions—sanitary or otherwise—as

may be detrimental to their health or morals; and it shall be unlawful to employ women in any occupation within the State of Oregon for wages which are inadequate to supply the necessary cost of living and to maintain them in health; and it shall be unlawful to employ minors in any occupation within the State of Oregon for unreasonably low wages.

Section 2. There is hereby created a commission composed of three commissioners, which shall be known as the "Industrial Welfare Commission"; and the word "Commission" as hereinafter used refers to and means said "Industrial Welfare Commission"; and the word "Commissioner" as hereinafter used refers to and means a member of said "Industrial Welfare Commission." Said Commissioners shall be appointed by the Governor. The Governor shall make his first appointments hereunder within thirty days after this bill becomes a law; and of the three Commissioners first appointed, one shall hold office until January 1, 1914, and another shall hold office until January 1, 1915, and the third shall hold office until January 1, 1916; and the Governor shall designate the terms of each of said three first appointees. On or before the first day of January of each year, beginning with the year 1914, the Governor shall appoint a Commissioner to succeed the Commissioner whose term expires on said first day of January; and such new appointee shall hold office for the term of three years from said first day of January. Each Commissioner shall hold office until his successor is appointed and has qualified; and any vacancy that may occur in the membership of said Commission shall be filled by appointment by the Governor for the unexpired portion of the term in which such vacancy occurs. A majority of said Commissioners shall constitute a quorum to transact business, and the act or decision of such a majority shall be deemed the act or decision of said Commission; and no vacancy shall impair the right of the remaining Commissioners to exercise all the powers of said Commission. The Governor shall, so far as practicable, so select and appoint said Commissioners—both the original appointments and all subsequent appointments—that at all times one of said Commissioners shall represent the interests of the employing class and one of said Commissioners shall represent the interests of the employed class and the third of said Commissioners shall be one who will be fair and impartial between employers and employees and work for the best interests of the public as a whole.

Section 3. The first Commissioners appointed under this act shall, within twenty days after their appointment, meet and organize said Commission by electing one of their number as Chairman thereof and by choosing a secretary of said



Commission; and by or before the 10th day of January of each year, beginning with the year 1914, said Commissioners shall elect a chairman and choose a secretary for the coming year. Each such chairman and each such secretary shall hold his or her position until his or her successor is elected or chosen; but said Commission may at any time remove any secretary chosen hereunder. Said secretary shall not be a Commissioner; and said secretary shall perform such duties as may be prescribed and receive such salary as may be fixed by said Commission. None of said Commissioners shall receive any salary as such. All authorized and necessary expenses of said Commission and all authorized and necessary expenditures incurred by said Commission shall be audited and paid as other State expenses and expenditures are audited and paid.

Section 4. Said Commission is hereby authorized and empowered to ascertain and declare, in the manner hereinafter provided, the following things: (a) Standards of hours of employment for women or for minors and what are unreasonably long hours for women or for minors in any occupation within the State of Oregon; (b) Standards of conditions of labor for women or for minors in any occupation within the State of Oregon and what surroundings or conditions—sanitary or otherwise—are detrimental to the health or morals of women or of minors in any such occupation; (c) Standards of minimum wages for women in any occupation within the State of Oregon and what wages are inadequate to supply the necessary cost of living to any such women workers and to maintain them in good health; and (d) Standards of minimum wages for minors in any occupation within the State of Oregon and what wages are unreasonably low for any such minor workers.

Section 5. Said Commission shall have full power and authority to investigate and ascertain the wages and the hours of labor and the conditions of labor of women and minors in the different occupations in which they are employed in the State of Oregon; and said Commission shall have full power and authority, either through any authorized representative or any Commissioner to inspect and examine any and all books and payrolls and other records of any employer of women or minors that in any way appertain to or have a bearing upon the questions of wages or hours of labor or conditions of labor of any such women workers or minor workers in any of said occupations and to require from any such employer full and true statements of the wages paid to and the hours of labor of and the conditions of labor of all women and minors in his employment.

**Section 6.** Every employer of women or minors shall keep a register of the names of all women and all minors employed by him, and shall, on request, permit any Commissioner or any authorized representative of said Commission to inspect and examine such register. The word "minor" as used in this act, refers to and means any person of either sex under the age of eighteen years; and the word "women," as used in this act, refers to and means a female person of or over the age of eighteen years.

**Section 7.** Said Commission may hold meetings for the transaction of any of its business at such times and places as it may prescribe; and said Commission may hold public hearings at such times and places as it deems fit and proper for the purpose of investigating any of the matters it is authorized to investigate by this act. At any such public hearing any person interested in the matter being investigated may appear and testify. Said Commission shall have power to subpoena and compel the attendance of any witness at any such public hearing or at any session of any Conference called and held as hereinafter provided; and any Commissioner shall have power to administer an oath to any witness who testifies at any such public hearing or at any such session of any Conference. All witnesses subpoenaed by said Commission shall be paid the same mileage and per diem as are allowed by law to witnesses in civil cases before the Circuit Court of Multnomah County.

**Section 8.** If, after investigation, said Commission is of opinion that any substantial number of women workers in any occupation are working for unreasonably long hours or are working under surroundings or conditions detrimental to their health or morals or are receiving wages inadequate to supply them with the necessary cost of living and maintain them in health, said Commission may call and convene a Conference for the purpose and with the powers of considering and inquiring into and reporting on the subject investigated by said Commission and submitted by it to such Conference. Such Conference shall be composed of not more than three representatives of the employers in said occupation and of an equal number of the representatives of the employees in said occupation and of not more than three disinterested persons representing the public and of one or more Commissioners. Said Commission shall name and appoint all the members of such Conference and designate the chairman thereof. Said Commission shall present to such Conference all information and evidence in the possession or under the control of said Commission which relates to the subject of the inquiry by such Conference; and said Commission shall

cause to be brought before such Conference any witnesses whose testimony said Commission deems material to the subject of the inquiry by such Conference. After completing its consideration of and inquiry into the subject submitted to it by said Commission, such Conference shall make and transmit to said Commission a report containing the findings and recommendations of such Conference on said subject. Accordingly as the subject submitted to it may require, such Conference shall, in its report, make recommendations on any or all of the following questions concerning the particular occupation under inquiry, to-wit: (a) Standards of hours of employment for women workers and what are unreasonably long hours of employment for women workers; (b) Standards of conditions of labor for women workers and what surroundings or conditions—sanitary or otherwise—are detrimental to the health or morals of women workers and (c) Standards of minimum wages for women workers and what wages are inadequate to supply the necessary cost of living to women workers and maintain them in health. In its recommendations on a question of wages such Conference shall, where it appears that any substantial number of women workers in the occupation under inquiry are being paid by piece rates as distinguished from time rate recommend minimum piece rates as well as minimum time rate and recommend such minimum piece rates as will in its judgment be adequate to supply the necessary cost of living to women workers of average ordinary ability and maintain them in health; and in its recommendations on a question of wages such Conference shall, when it appears proper or necessary, recommend suitable minimum wages for learners and apprentices and the maximum length of time any woman worker may be kept at such wages as a learner or apprentice, which said wages shall be less than the regular minimum wages recommended for the regular women workers in the occupation under inquiry. Two-thirds of the members of any such Conference shall constitute a quorum; and the decision or recommendation or report of such a two-thirds on any subject submitted shall be deemed the decision or recommendations or report of such Conference.

Section 9. Upon receipt of any report from any Conference said Commission shall consider and review the recommendations contained in said report; and said Commission may approve any or all of said recommendations or disapprove any or all of said recommendations; and said Commission may re-submit to the same Conference or a new Conference any subject covered by any recommendations so disapproved. If said Commission approves any recommendations

contained in any report from any Conference, said Commission shall publish notice, not less than once a week for four successive weeks in not less than two newspapers of general circulation published in Multnomah County, that it will on a date and at a place named in said notice hold a public meeting at which all persons in favor of or opposed to said recommendations will be given a hearing; and, after said publication of said notice and said meeting, said Commission may, in its discretion, make and render such an order as may be proper or necessary to adopt such recommendations and carry the same into effect and require all employers in the occupation affected thereby to observe and comply with such recommendations and said order. Said order shall become effective in sixty days after it is made and rendered and shall be in full force and effect on and after the sixtieth day following its making and rendition. After said order becomes effective and while it is effective, it shall be unlawful for any employer to violate or disregard any of the terms or provisions of said order or to employ any woman worker in any occupation covered by said order for longer hours or under different surroundings or conditions or at lower wages than are authorized or permitted by said order. Said Commission shall, as far as is practicable, mail a copy of any such order to every employer affected thereby; and every employer affected by any such order shall keep a copy thereof posted in a conspicuous place in each room in his establishment in which women workers work. No such order of said Commission shall authorize or permit the employment of any woman for more hours per day or per week than the maximum now fixed by law.

Section 10. For any occupation in which only a minimum time rate wage has been established, said Commission may issue to a woman physically defective or crippled by age or otherwise a special license authorizing her employment at such wage less than said minimum time rate wage as shall be fixed by said Commission and stated in said license.

Section 11. Said Commission may at any time inquire into wages or hours or conditions of labor of minors employed in any occupation in this state and determine suitable wages and hours and conditions of labor for such minors. When said Commission has made such determination, it may issue an obligatory order in the manner provided for in Section 9 of this Act, and, after such order is effective, it shall be unlawful for any employer in said occupation to employ a minor at less wages or for more hours or under different conditions of labor than are specified or required in or by said order; but no such order of said Commission shall authorize or permit

the employment of any minor for more hours per day or per week than the maximum now fixed by law or at any times or under any conditions now prohibited by law.

Section 12. The word "occupation" as used in this Act shall be so construed as to include any and every vocation and pursuit and trade and industry. Any Conference may make a separate inquiry into and report on any branch of any occupation; and said Commission may make a separate order affecting any branch of any occupation. Any Conference may make different recommendations and said Commission may make different orders for the same occupation in different localities in the State when, in the judgment of such Conference or said Commission, different conditions in different localities justify such different recommendations or different orders.

Section 13. Said Commission shall, from time to time, investigate and ascertain whether or not employers in the State of Oregon are observing and complying with its orders and take such steps as may be necessary to have prosecuted such employers as are not observing or complying with its orders.

Section 14. The "Commissioner of Labor Statistics and Inspector of Factories and Work Shops" and the several officers of the "Board of Inspection of Child Labor" shall, at any and all times, give to said Commission any information or statistics in their respective offices that would assist said Commission in carrying out this act and render such assistance to said Commission as may not be inconsistent with the performance of their respective official duties.

Section 15. Said Commission is hereby authorized and empowered to prepare and adopt and promulgate rules and regulations for the carrying into effect of the foregoing provisions of this act, including rules and regulations for the selection of members and the mode of procedure of Conferences.

Section 16. All questions of fact arising under the foregoing provisions of this act shall, except as otherwise herein provided, be determined by said Commission, and there shall be no appeal from the decision of said Commission on any such question of fact; but there shall be a right of appeal from said Commission to the Circuit Court of the State of Oregon for Multnomah County from any ruling or holding on a question of law included in or embodied in any decision or order of said Commission, and on the same question of law, from said Circuit Court to the Supreme Court of the State of Oregon. In all such appeals the Attorney General shall appear for and represent said Commission.

**Section 17.** Any person who violates any of the foregoing provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars or by imprisonment in the county jail for not less than ten days nor more than three months or by both such fine and imprisonment in the discretion of the court.

**Section 18.** Any employer who discharges or in any other manner discriminates against any employee because such employee has testified, or is about to testify, or because such employer believes that said employee may testify, in any investigation or proceedings under or relative to this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five (\$25.00) dollars nor more than one hundred (\$100.00) dollars.

**Section 19.** If any woman worker shall be paid by her employer less than the minimum wage to which she is entitled under or by virtue of an order of said Commission, she may recover in a civil action the full amount of her said minimum wage less any amount actually paid to her by said employer, together with such attorneys' fees as may be allowed by the Court; and any agreement for her to work for less than such minimum wage shall be no defense to such action.

**Section 20.** Said Commission shall, on or before the first day of January of the year 1915 and of each second year thereafter, make a succinct report to the Governor and Legislature of its work and the proceedings under this act during the preceding two years.

**Section 21.** There is hereby appropriated out of the general fund of the State of Oregon the sum of Thirty-five Hundred (\$3500.00) dollars per annum, or so much thereof as may be necessary per annum, to carry into effect the provisions of this act and to pay the expenses and expenditures authorized by or incurred under this act.

Filed in the office of Secretary of State, February 17, 1913.

General Laws, Oregon, 1913, Ch. 62.



## III

OPINION OF SUPREME COURT OF OREGON IN THE  
STETTLER CASE

EAKIN, J.: (Stating facts.)

On February 17, 1913, the legislative assembly passed an act entitled: "To protect the lives and health and morals of women and minor workers, and to establish an Industrial Welfare Commission and define its powers and duties, and to provide for the fixing of minimum wages and maximum hours and standard conditions of labor for such workers, and to provide penalties for violation of this act." The title is followed by a declaration of the evils that it is desired to remedy as follows: "Whereas, the welfare of the state of Oregon requires that women and minors should be protected from conditions of labor which have a pernicious effect on their health and morals, and inadequate wages and unduly long hours and unsanitary conditions of labor have such a pernicious effect; therefore, be it enacted by the people of the state of Oregon." The first section provides: "It shall be unlawful to employ women or minors in any occupation within the state of Oregon for unreasonably long hours; and it shall be unlawful to employ women or minors in any occupation within the state of Oregon under such surroundings or conditions—sanitary or otherwise—as may be detrimental to their health or morals; and it shall be unlawful to employ women in any occupation within the state of Oregon for wages which are inadequate to supply the necessary cost of living and to maintain them in health; and it shall be unlawful to employ minors in any occupation within the state of Oregon for unreasonably low wages." Then follows the creation of the commission under the name of "Industrial Welfare Commission," to be appointed by the Governor, and provisions defining its duties. Section 4 provides: "Said commission is hereby authorized and empowered to ascertain and declare, in the manner hereinafter provided, the following things: (a) Standards of hours of employment for women or for minors and what are unreasonably long hours for women or for minors in any occupation within the state of Oregon; (b) standards of conditions of labor for women or for minors in any occupation within the state of Oregon and what surroundings or conditions—sanitary or otherwise—are detrimental to the health or morals of women or for minors in any such occupation; (c) standards of minimum wages for women in any occupation within the state of Oregon and what wages are inadequate to



supply the necessary cost of living to any such women workers and to maintain them in good health; and (d) standards of minimum wages for minors in any occupation within the state of Oregon and what wages are unreasonably low for any such minor workers." Section 8 provides, among other things, that the "commission may call and convene a conference for the purpose and with the powers of considering and inquiring into and reporting on the subject investigated by said commission and submitted by it to such conference. Such conference shall be composed of not more than three representatives of the employers in said occupation and of an equal number of the representatives of the employees in said occupation and of not more than three disinterested persons representing the public and of one or more commissioners," and the duties of such conference which shall report the result of its investigations with recommendations to the commission. Section 9 provides that upon the receipt of the report from the conference, and the approval of its recommendations, the commission may make and render such order as may be proper or necessary to adopt such recommendations and to carry the same into effect, and require all employers in the occupation affected thereby to observe and comply with such recommendations and said order. The act contains other provisions giving the commission and conference power and authority to investigate the matters being considered, and that from the matters so determined by the commission there shall be no appeal on any question of fact; but that there shall be a right of appeal from the commission to the circuit court from any ruling or holding on a question of law included or embodied in any decision or order by the commission, and from the circuit court to the supreme court. The defendants were duly appointed by the Governor as such commission. It thereafter called a conference as provided, which reported to the commission, making certain recommendations, which were approved; and based upon such recommendations, it made the following order: "The Industrial Welfare Commission of the state of Oregon hereby orders that no person, firm, corporation, or association owning or operating any manufacturing establishment in the city of Portland, Oregon, shall employ any woman in said establishment for more than nine hours a day, or fifty hours a week; or fix, allow, or permit for any woman employee in said establishment a noon lunch period of less than forty-five minutes in length; or employ any experienced adult woman worker, paid by time rates of payment, in said establishment at a weekly wage of less than \$8.64, any lesser amount being hereby declared inadequate to supply the necessary cost of living to such woman factory workers, and to maintain them in health." The amend-

ed complaint sets out all these matters in greater detail, to which the defendants demurred on various grounds, the first of which raises the questions here discussed, namely, that "it does not state facts showing that the act and order complained of is an unreasonable exercise of the police power of the state." The demurrer was sustained, and the plaintiff elected to stand on the amended complaint. Judgment was rendered dismissing the suit, and the plaintiff appeals.

EAKIN, J.: (Opinion.)

The purpose of this suit is to have determined judicially whether either the fourteenth amendment of the federal constitution, or section 20, article I, of the Oregon constitution is an inhibition against the regulation by the legislature of the hours of labor during which women may be employed in any mechanical or manufacturing establishment, mercantile occupation, or other employment requiring continuous physical labor; or against the establishment of a minimum wage to be paid therefor. Some features of these questions are practically new in the courts of this country. There have been some utterances by the courts of last resort to the effect that it is such an inhibition. Some of these cases relate exclusively to the limitation of the hours of employment, others to the wages to be paid on contracts with the state or municipality; but the cases so holding are based largely on the fact that such regulation deprives the individual of liberty and property without due process of law, namely, that it is not within the police power of the state and violates the liberty of contract. The first case holding such a statute unconstitutional is *Lochner v. New York*, 198 U. S. 45; 25 Sup. Ct. 539; 49 L. Ed. 937, annotated in 3 Ann. Cas. 1133. A similar case is *Ritchie v. People*, 155 Ill. 98; 40 N. E. 454; 29 L. R. A. 79; 46 Am. St. Rep. 315. In the former case, in the appellate division of the state court, two of five judges were in favor of upholding the law; in the supreme court of the state three of the seven judges were so minded; and in the United States court four of the nine judges favored such a disposition of the case. The opinions in those decisions are based upon very different theories, showing that judicial opinion has not reached any settled or stable basis upon which to rest. It has only been during the last few years that the matter of legislation upon the question of the limitation of hours of labor has been agitated in legislative bodies or in the courts. The decisions of the courts have been based upon first impression and may be liable to fluctuation from one extreme to the other before the extent of the power of legislation on these questions is finally settled. The entry of woman into the realm of

many of the employments formerly filled by man, in which she attempts to compete with him, is a recent innovation; and it has created a condition which the legislatures have deemed it their duty to investigate and to some extent to govern. It is conceded by all students of the subject, and they are many and their writings extensive, that woman's physical structure and her position in the economy of the race renders her incapable of competing with man either in strength or in endurance. This is well emphasized by Justice Brewer in *Muller v. Oregon*, 208 U. S. 412; 28 Sup. Ct. 324; 52 L. Ed. 551; 13 Ann. Cas. 957, an appeal from Oregon questioning the constitutionality of the law fixing the maximum hours of labor for woman, where he says: "That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. Still, again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. \* \* \* Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him \* \* \* that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. \* \* \* This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her." The conditions mentioned in the above quo-

tation lie at the foundation of all legislation attempted for the amelioration of woman's condition in her struggle for subsistence. In many of the states as well as in foreign countries special study and investigation have been given to this question as to the effect of long hours of labor and inadequate wages upon the health, morals, and welfare of woman, with a view to remedy the evil results as far as possible. There seems to be a very strong and growing sentiment throughout the land, and a demand, that something must be done by law to counteract the evil effects of these conditions. In the case of *Lochner v. New York*, *supra*, in which the constitutionality of the labor law of New York, limiting the hours of labor in bakeries is questioned, Justice Peckham wrote the opinion holding the law invalid. Justice Harlan filed a dissenting opinion which should not be overlooked as the parts here quoted are general statements of the law recognized by judicial opinion and not in conflict with the main opinion. Justices White and Day concurred also therein; Justice Holmes dissenting. In that opinion it is said: "While this court has not attempted to mark the precise boundaries of what is called the police power of the state, the existence of the power has been uniformly recognized, both by the federal and state courts." In quoting from *Patterson v. Kentucky*, 97 U. S. 501, he says: "It (this court) has nevertheless with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens. But neither the (14th) Amendment—broad and comprehensive as it is—nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people. \* \* \* Granting then that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for, the rule is universal that a legislative enactment, federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power." The opinions of the justices who hold the maximum hours laws unconstitutional are based largely upon the fact that they violate

the liberty of contract; holding that such acts are not within the fair meaning of the term "a health law," but are an illegal interference with the rights of the individual and are not within the police power of the legislature to enact. The right of the state to prescribe the number of hours one may work or be employed on public works is generally upheld for the reason that the state may determine for itself what shall constitute a day's work of a laborer on public works, which violates no individual right of property or liberty of contract. *Penn Bridge Co. v. United States*, 29 App. Cas. (D. C.) 452, 10 Ann. Cas. 720; *Byars v. State*, 2 Okla. Crim. 481, 102 Pac. 804, 22 Ann. Cas. 765; *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 30 Ann. Cas. 304. So it is held that work underground or in a smelter is unhealthy and may be regulated in *ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, 1 Ann. Cas. 66; *Holden v. Hardy*, 169 U. S., 366; *ex parte Kair*, 28 Nev. 127, 425, 80 Pac. 463, 82 Pac. 453, 6 Ann. Cas. 893. In the *Lochner case*, *supra*, employment in a bakery and candy factory is held not to be unhealthy, and that a statute limiting the hours of labor therein is void. A statute fixing the hours of labor for women is held valid in *State v. Muller*, 48 Or. 252, 85 Pac. 855, 120 Am. St. Rep. 205, annotated in 11 Ann. Cas. 88, which case is affirmed in 208 U. S. 412 and annotated in 13 Ann. Cas. 957. In *Ritchie v. People*, *supra*, the law limiting hours of work for women was held void. However, in *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994, such a law was held valid as within the police power of the legislature; and again, in *People v. Chicago*, *supra*, and in *People v. Elerding*, 254 Ill. 579, 92 N. E. 982, the law was upheld. Thus it appears that Illinois has wholly receded from the decision in the case of *Ritchie v. People*, *supra*, and it may now be considered as established that a statute which limits the hours of labor of certain occupations or for certain classes of persons for the protection of the health and welfare of society is within the police power of the state. *Commonwealth v. Riley*, 210 Mass. 387, 97 N. E. 367, 25 Ann. Cas. 388; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324. It was said in *People v. Elerding*, *supra*, wherein a statute limiting the working hours per day for males was held constitutional as a valid exercise of the police power: "That under the police power of the state the general assembly may enact legislation to prohibit all things hurtful to the health, welfare and safety of society, even though the prohibition invade the right of liberty or property of the individual, is too well-settled to require discussion or the citation of authority. \* \* \* While, in its last analysis, it is a judicial question whether an act is a proper exercise of the police power, it is the province of the legislature to deter-



mine when an exigency exists calling for the exercise of this power. When the legislative authority has decided an exigency exists calling for the exercise of the power and has adopted an act to meet the exigency, the presumption is that it is a valid enactment, and the courts will sustain it unless it appears beyond any reasonable doubt, that it is in violation of some constitutional limitation." On the same subject it is said in *Lochner v. New York*, *supra*, quoting from *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, relating to the vaccination statute, that "the power of the courts to review legislative action in respect of a matter affecting the general welfare exists only 'when that which the legislature has done comes within the rule that if a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is beyond all question a plain, palpable invasion of rights secured by the fundamental law.' \* \* \* If there be doubt as to the validity of the statute that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation." In *re Spencer*, 149 Cal. 396, 9 Ann. Cas. 1105, it is said: "The presumption always is that an act of the legislature is constitutional, and when this depends upon the existence or non-existence of some fact, or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce in its decision, unless the error clearly appears." The legislative power of the state is not derived by grant of the constitution, but exists as to all subjects not inhibited by the state or federal constitution.

There is only one federal inhibition urged against this statute, namely: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction an equal protection of the law." Fourteenth amendment. It may probably be conceded that the public welfare statute in question here violates this clause as abridging privileges of citizens if it can not be justified as a police measure; and we will assume, without entering into a discussion of that question or citation of authorities, that provisions enacted by the state under its police power that have for their purpose the protection or betterment of the public health, morals, peace, and welfare, and reasonably tend to that end, are within the power of the state notwithstanding they may apparently conflict with the fourteenth amendment of the federal constitution.

So that the first and principal question for decision is whether the provisions of the act before us are within the police power of the state. Professor Tucker, in 8 *Cyc.*, 863, says:

"Police power is the name given to that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy, in a broad sense, demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires." This is a comprehensive definition and we will accept it without further detailed analysis or citation of authority. As will appear from the cases cited above we can accept as settled law statutes having for their purpose and tending to that end provision for a maximum hours law of labor for employees upon public works, a maximum hours law for women and children employed in mechanical, mercantile, or manufacturing establishments, a maximum hours law for laborers in mines or smelters, a law fixing minimum wages for employees upon public works. The latter is held in *Malette v. Spokane* (Wash.), 137 Pac. 500, even where the expense is borne by private individuals, so that the only question for decision here is as to the power of the legislature to fix the minimum wage in such a case. We use the language of Mr. Malarkey: "The police power, which is another name for the power of government, is as old and unchanging as government itself. If its existence be destroyed government ceases. There have been many attempts to define the police power and its scope; but because of confusing the power itself with the changing conditions calling for its application, many of the definitions are inexact and unsatisfactory. The courts have latterly eliminated much of this confusion by pointing out that, instead of the power being expanded to apply to new conditions, the new conditions are, as they arise, brought within the immutable and unchanging principles underlying the power. When new conditions arise which injuriously affect the health or morals or welfare of the public, we no longer say that we will expand the police power to reach and remedy the evil. Instead we say that a new evil has arisen which an old principle of government—the police power—will correct." If the statute tends reasonably to accomplish the purposes intended by the legislature, it should be upheld by the court. Justice Harlan in *Jacobson v. Massachusetts*, *supra*, quoting from *Vie-meister v. White*, 191 U. S. 223, states: "A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the court. \* \* \* The fact that the belief is not universal is not controlling, for there is scarcely any belief



that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the State, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." In speaking of the Oregon ten hour law, Chief Justice Bean, in the case of *State v. Muller, supra*, says: "Such legislation must be taken as expressing the belief of the legislature, and through it of the people, that the labor of females in such establishments in excess of 10 hours in any one day is detrimental to health and injuriously affects the public welfare. The only question for the court is whether such a regulation or limitation has any real or substantial relation to the object sought to be accomplished, or whether it is 'so utterly unreasonable and extravagant' as to amount to a mere arbitrary interference with the right to contract. On this question we are not without authority." These are some of the grounds upon which maximum ten hours laws are sustained, and we have cited them here as applying with equal force to sustain the women's minimum wage law and as bringing it within the police power of the legislature. The state should be as zealous of the morals of its citizens as of their health. The "whereas clause" quoted above is a statement of the facts or conclusions constituting the necessity for the enactment and the act proceeds to make provision to remedy these causes. "Common belief" and "common knowledge" are sufficient to make it palpable and beyond doubt that the employment of female labor as it has been conducted is highly detrimental to public morals and has a strong tendency to corrupt them. Elizabeth Beardsley Butler in her "Women of the Trades" says: "Yet the fact remains that, for the vast bulk of sales girls, the wages paid are not sufficient for self-support; and where girls do not have families to fall back on, some go undernourished, some sell themselves. And the store-employment which offers them this two-horned dilemma is replete with op-

portunities which in gradual, easy, attractive ways beckon to the second choice; a situation which a few employers not only seem to tolerate, but to encourage." The legislature of the state of Massachusetts appointed a commission known as the Commission on Minimum Wage Boards to investigate conditions. In the report of that commission in January, 1912, it is said: "Women in general are working because of dire necessity, and in most cases the combined income of the family is not more than adequate to meet the family's cost of living. In these cases it is not optional with the woman to decline low-paid employment. Every dollar added to the family income is needed to lighten the burden which the rest are carrying. \* \* \* Wherever the wages of such a woman are less than the cost of living and the reasonable provision for maintaining the worker in health, the industry employing her is in receipt of the working energy of a human being at less than its cost, and to that extent is parasitic. The balance must be made up in some way. It is generally paid by the industry employing the father. It is sometimes paid in part by future inefficiency of the worker herself and by her children, and perhaps in part ultimately by charity and the state. \* \* \* If an industry is permanently dependent for its existence on underpaid labor, its value to the Commonwealth is questionable." Many more citations might be made from the same authorities and from such students of the question as Miss Caroline Gleason, of Portland, Oregon, Louise B. More, of New York, Irene Osgood of Milwaukee, and Robert C. Chapin, of Beloit College. With this common belief, of which Justice Harlan says "we take judicial notice," the court cannot say, beyond all question, that the act is a plain, palpable invasion of rights secured by the fundamental law, and has no real or substantial relation to the protection of public health, the public morals, or public welfare. Every argument put forward to sustain the maximum hours law or upon which it was established applies equally in favor of the constitutionality of the minimum wage law as also within the police power of the state and as a regulation tending to guard the public morals and the public health.

Plaintiff by his complaint, questions the law also as a violation of section 20, of article I, of the constitution of Oregon. As we understand this contention it is that the order applies to manufacturing establishments in Portland alone, that other persons in the same business in other localities are unaffected by it, and that it is discriminatory. The law by which plaintiff is bound is contained in section 1 of the act quoted above. If he will, he can comply with this provision without any action by the commission, and it applies to all the state alike.

The other provisions of the act are for the purpose of ascertaining for those who are not complying with it what are reasonable hours of labor and what is a reasonable wage in the various occupations and localities in the state to govern in the application of section 1 of the act and for the purpose of fixing penalties for violations thereof. Counsel seem to consider the order of the commission as a law which the commission has been authorized to promulgate, but we do not understand this to be its province. Section 4 provides: "Said commission is hereby authorized and empowered to ascertain and declare \* \* \* (a) standards of hours," etc. By section 8 it is only after investigation by the commission, and when it is of opinion therefrom that any substantial number of women in any occupation are working unreasonably long hours or for inadequate wages, that it shall by means of a conference, ascertain what is a reasonable number of hours for work and a minimum rate of wages, when it may make such an order as may be necessary to adopt such regulation as to hours of work and minimum wages; and section 1 of the act shall be enforced on that basis. There is nothing in the record suggesting that there is a substantial number of women workers in the same occupation as those included in the order complained of here working unreasonably long hours or for an inadequate wage in any other locality than Portland. Other cases as they are discovered are to be remedied as provided therefor, but the law is state-wide and it does not give to plaintiff unequal protection of the law nor grant to others privileges denied to him; neither does it delegate legislative power to the commission. It is authorized only to ascertain facts that will determine the localities, businesses, hours and wages to which the law shall apply. Counsel urges that the law upon this question interferes with plaintiff's freedom of contract, and refers to the language used in *re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, to-wit: "Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will," etc., as a change brought about by the larger freedom enjoyed in this country and guaranteed by the federal constitution and the constitutions of the various states in comparison with conditions in the earlier days of the common law, when it was found necessary to prevent extortion and oppression by royal proclamation or otherwise, and to establish reasonable compensation for labor; but he fails to take note that by reason of this larger freedom the tendency is to return to the earlier conditions of long hours and low wages, so that some classes in some employments seem to need protection from the same con-

ditions for which royal proclamation was found necessary. The legislature has evidently concluded that in certain localities these conditions prevail even in Oregon; that there are many women employed at inadequate wages—employment not secured by the agreement of the worker at satisfactory compensation, but at a wage dictated by the employer. The worker in such a case has no voice in fixing the hours or wages, or choice to refuse it, but must accept it or fare worse. As said in *Wells v. Great Northern Ry. Co.*, 59 Or. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A. (N. S.) 818, as to a baggage contract printed on the ticket of a passenger: "In this case neither was it the subject of agreement between the company and the carrier (passenger), but was imposed by the company as a condition of the sale of the ticket, and in signing the ticket the plaintiff was laboring under such an inequality of conditions as that he was compelled to enter into the contract, whether he would or not." In the dissenting opinion in the *Lochner case*, *supra*, it is said: "It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakeries and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be that as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who labor."

Counsel suggest it is only quite recently that it has been seriously contended that the states may lawfully establish a minimum wage in private employment. This is undoubtedly true, and it may be that there is an occasion for it. The legislature seems to have acted on the idea that conditions have changed, or that private enterprises have become so crowded that their demands amount to unreasonable exactions from women and children; that occasion has arisen for relief through its police power; and that it has determined the public welfare demands the enactment of this statute. Justice Washington, in *Ogden v. Saunders*, 12 Wheat. 269, says that the question which he has been examining is involved in difficulty and doubt, "but if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would in my estimation be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in

favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt."

Plaintiff further contends that the statute is void for the reason that it makes the findings of the commission on all questions of fact conclusive, and, therefore, takes his property without due process of law; relying on the decision of *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 33 L. Ed. 970, as conclusive upon that question. That case was an attack upon the law creating a railway and warehouse commission, which was held valid by the state of Minnesota, but the United States court reversed the judgment there for the reason that the law does not provide for a hearing by the parties affected by the order, which is not due process of law, and that no notice and opportunity to be heard is provided for, which is the principal ground upon which the state court was reversed. *Louisville & N. R. Co. v. Garrett*, 34 Sup. Ct. Rep. 48, is a case very much in point, in which was had a hearing before the railroad commission of Kentucky, fixing freight rates between certain points within the state. The plaintiff attacked the legality of these orders because they were final and conclusive without right of appeal, and that by reason thereof plaintiff was deprived of property without due process of law. In deciding this question, the court said: "It (the law) required a hearing \* \* \* and a determination by the commission whether the existing rates were excessive. But on these conditions being fulfilled, the questions of fact which might arise \* \* \* would not become, as such, judicial questions to be re-examined by the courts. The appropriate questions for the court would be whether the commission acted within the authority duly conferred." Thus, in the present case, plaintiff was given the right and opportunity to be heard before the commission, as provided for by section 9 of the act. In the third subdivision of the opinion in the latter case it is held that even though the law gives no right of appeal from the final finding of facts, a party aggrieved is not without remedy as to matters that would be the appropriate subject of judicial inquiry, namely, if the rates fixed are confiscatory; but, where such a board has fully and fairly investigated and fixed what it believes to be reasonable rates, the party affected thereby has not been deprived of due process of law. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. Rep. 804, 43 L. Ed. 1154; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046; *Louisville & N. R. Co. v. Garret*, *supra*. Many other cases are cited in the briefs of defendants fully supporting their contention. Due process of law merely requires such tribunals as are proper to deal with the subject in hand. Reasonable notice and a fair opportunity to be heard before



some tribunal before it decides the issues are the essentials of due process of law. It is sufficient for the protection of his constitutional rights if he has notice and is given an opportunity at some state of the proceedings to be heard. *Towns v. Klamath County*, 33 Or. 225, 53 Pac. 604.

We think we should be bound by the judgment of the legislature that there is a necessity for this act, that it is within the police power of the state to provide for the protection of the health, morals, and welfare of women and children, and that the law should be upheld as constitutional.

The decree of the Circuit Court is affirmed.

McBride, C. J., not sitting.

139 Pac. (Ore.) 743.

#### IV

### OPINION OF SUPREME COURT OF OREGON IN THE SIMPSON CASE

McBRIDE, C. J., (stating facts) :

This is a suit the object of which is to have judicially determined the question whether an act passed by the legislature on February 17, 1913 (Session Laws 1913, chap. 62), and commonly known as the minimum wage act, is inimical to the fourteenth amendment to the Constitution of the United States, or to section 20, article I, of the Constitution of Oregon. The defendants demurred to the complaint. The court sustained the demurrer, and dismissed the complaint. Plaintiff appeals.

McBRIDE, C. J.: (Opinion.)

This suit is similar in substance and is brought for the same purpose as the case of *Stettler v. O'Hara*, 139 Pac. 743, in which Mr. Justice Eakin, speaking for the court, held the act in question to be a valid exercise of the police power, and not in conflict with either the Constitution of the United States or of this state. It is suggested, however, on this appeal that in the case of *Stettler v. O'Hara*, before cited, this court did not pass upon the contention raised in the pleadings and upon the argument, that the minimum wage act is inimical to that portion of section 1 of the fourteenth amendment to the Constitution of the United States, which provides: "No state shall make or enact any law which shall abridge the privileges or immunities of citizens of the United States." While this particular clause of the amendment is not specially discussed, it was certainly

intended by that opinion to express the conviction of this court that the act in question violated no precept of the fourteenth amendment, which it will be noted does not attempt to define the nature or extent of the privileges and immunities therein protected. Having determined in the preceding case that the police power of the state legitimately extended to the right to prevent the employment of women and children for unreasonably long hours or at unreasonably small wages, and that the state had a right to use the machinery of a commission to determine to the extent stated in the opinion the length of time and at what wages such persons might be employed, it would seem to follow as a natural corollary that the right to labor for such hours and at such wages as would reasonably seem to be detrimental to the health or welfare of the community is not a privilege or immunity of any citizen. The guaranties of the fourteenth amendment are not new in American history; they existed substantially in the constitutions of many of the states, and, excepting as to the status of the negro, were well-nigh universal in the United States. Primarily, for the better protection of a newly-enfranchised race, it was thought expedient to make the general government a co-guarantor with the states of these fundamental privileges of freemen. But that the effect of this would be to limit the power of the states to enact reasonable laws for the protection of their women and children against the consequences of labor for a length of time tending to impair health or at a wage barely sufficient to sustain life never entered the imagination of the statesmen who framed it. Local self-government lies at the very foundation of freedom and the private and local affairs of a community are sacred from the interference of the central power unless oppressive and unreasonable encroachment on the liberties of the citizen renders such interference imperatively necessary, and such is not the case here.

The decree of the Circuit Court is affirmed.

141 Pac. (Ore.) 158.











## “MINIMUM WAGE”

In Debate at the Annual Dinner of the National Retail Dry Goods  
Association, Hotel Knickerbocker, New York

February 10, 1915

BETWEEN

MR. NORMAN HAPGOOD, of New York (*Affirmative*)

AND

MR. ROME G. BROWN, of Minneapolis (*Negative*)

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### NEGATIVE ARGUMENT BY MR. BROWN

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*Mr. President, Ladies and Gentlemen:*

As Mr. Hapgood has intimated, there is a subject which I have studied longer than that of the Minimum Wage, and which I would much prefer to debate with him. No one doubts Mr. Hapgood's humanitarianism or the sincerity of his endeavors, as an editor and as a citizen, to promote the welfare of mankind. Our differences are not at all as to the objects to be accomplished, but are only as to the methods best adapted for our common purpose. I assume that all of us are interested in the welfare of women workers, and of workers of all classes, and that we desire to promote their general welfare, health and comfort, and to co-operate in any effort by which their efficiency may be increased and by which the compensation paid for their work may be raised to the highest point at which it can reasonably be maintained.

I am not, none of us are, opposed to high wages. We are in favor of a minimum wage, and that, too, a wage which is not merely commensurate with the bare cost of living, but, so far as reasonably possible, one which will supply to every worker health, comfort and happiness in the broadest sense of those terms.

What I am opposing is the compulsory legislative minimum wage in private employment; because such legislation is against the interests of both employer and employee and, further, because it is based upon a theory which is not susceptible of legislative enactment under our form of government.

When I oppose the minimum wage, therefore, I mean the statutory minimum wage. Its advocates forget that it is not for the general welfare that a temporary or local interest of one class be selected as the subject of artificial stimulation through special legislation. They forget that ultimately the prosperity of the worker is coincident with, and depends upon, the general prosperity of the community and that that general prosperity means industrial development. It means, in short, the prosperity of the employer.

#### FALLACIES OF THE MINIMUM WAGE

It is one of the fallacies of the minimum wage that wages can be measured out by a fixed rule, which does not take into consideration the element of efficiency. Wages must depend upon, at least must have some substantial relation to, the compensation rendered by the worker in return. Now you can not legislate efficiency. When you compel an employer to pay a wage which is fixed regardless of the worker's efficiency, you are legislating a forced gratuity to the worker, no matter that the wage be measured by the cost of living or by any other standard which disregards its fair worth. If its theoretical object of increasing the wage of the inefficient worker were practicable, the minimum wage would have the same effect upon such worker as would a pension. It would destroy initiative and ambition and deprive her of incentive toward raising her standard of efficiency; it would be a drag upon her development as a wage-earner and as a citizen. But, in practice, it can not increase the wage of the inefficient worker. It simply renders her jobless, and this, too, without any compensating benefits, either to her or to the working class or to the community.

All wages are not what they should be, but as a rule they are higher in this country than anywhere else in the world. Betterment of existing wage conditions is advancing, and it may be further advanced by co-operative effort, by enlightenment of both employer and employee. The main reason for our present higher wages, as compared with those in foreign countries, is the higher standard of labor here, and the recognition by the employer of the higher efficiency of the American worker. There are some economic facts which can not be changed by legislative fiat. Wages must depend, to some degree at least, upon wage-worth. That fact may be denied by the terms of a statute; but no statute can make it not a fact.

The abstract basis of the living wage is largely that of benevolence, but you can not create benevolence, nor the exercise of any

other virtue, by legislative enactment. There are certain precepts of morals which are not susceptible of statutory enforcement. The observer of the Golden Rule shows morality only in so far as he acts voluntarily. His action ceases to be virtuous or moral when once you have enacted into a statute the precept of the Golden Rule and when its observance is enforced under the threat of fine and imprisonment. Actions otherwise virtuous,—of benevolence, of charity, of neighborly love,—are deprived of all elements of morality when performed under compulsion. Compulsion stifles the humanitarian motive. It sets a hard and fast limit to the otherwise voluntary effort for the general welfare of the worker, and makes the artificially increased standard of wages an object of hostility and attack, instead of a goal to be reached by voluntary, co-operative, moral endeavor.

#### MINIMUM WAGE DEFINED

Such is the difference between the ethical minimum wage and the legislative compulsory minimum wage. For, note this: The minimum wage statute provides that, as a condition of employment, the employee must demand for her work and the employer must pay—regardless of the efficiency of the employee, or of the worth of her work to her employer, or of the ability of the employer to pay—at least such a wage as shall equal an amount necessary to furnish to the worker the cost of living in health and comfort; and this, under penalty of fine or imprisonment for the employer failing to meet the requirements. In other words, the employer is compelled to contribute to the individual, who happens to be upon his pay roll, the difference between what that individual earns and what it is deemed that it should cost her to live. It is a forced gratuity as to every cent above the reasonable worth of the worker; because the need for which the difference is supplied is one which is purely individual and does not arise out of the fact or nature of the employment. Such statutes have been passed in Oregon, California, Washington, Colorado, Wisconsin and Minnesota, where the cost of living is determined by a Commission; and in Utah, where the statute fixes the wage arbitrarily, without reference to the cost of living or any other consideration. In these states no provision is made for even considering the financial condition of the occupation or of the employer, or the efficiency of the employee. These statutes apply to women workers, and also in some states, to minors and apprentices. As to these statutes, Mr. Hapgood does not disagree very much with my position, but he



says that, under the Massachusetts statute, the compulsory feature is eliminated, and apparently he would have New York, as did Nebraska, follow the example of Massachusetts.

#### THE MASSACHUSETTS STATUTE OBNOXIOUSLY COMPULSORY

Now, I have had this week further opportunity to look into the Massachusetts situation, and I find that, no matter what the terms of the Massachusetts statute, in its practical effect it is most obnoxiously compulsory. Although, in terms, it affords the employer a hearing on the question of the reasonableness of the wage fixed and of his ability to pay, in practice those provisions are without effect. The State Commission and its Wage Boards are, and have been, mere instruments for carrying out the demands of the employees. Official reports of facts are ignored if they conflict with a preconceived notion as to what the wage in any occupation investigated should be. When the wage is promulgated by the Commission, although there is no fine or imprisonment for the employer, if he fails to comply he is published throughout the state as an unreasonable recalcitrant. Indeed the statute makes it a crime for any newspaper publisher to refuse thus publicly to blacklist one who may be his own relative or his best paying advertiser—or even himself. This is an attempt to legalize an official blacklist or system of boycotting. It was deemed that a penalty of fine or imprisonment for non-compliance by employers was illegal because, as was rightly assumed, non-compliance could not constitutionally be made a crime. Now, our Federal and state laws make it illegal, and the subject of heavy fine and imprisonment, for anyone, even in secret, to establish or publish a blacklist, or to organize a boycott, against any individual or any class of individuals, either of employers or employees, and this, too, whether the object is to retaliate for either lawful or unlawful action or refusal to comply with some demand. The penalties for such a boycott are more severe than any penalty ever written into a minimum wage statute; and this for the very reason that, independent of the nature of the grounds alleged for the boycott, the organized blacklisting or boycotting of a business or an individual is, of itself, so drastic, so susceptible of damage to its victim, that the law has wisely made it a criminal offense and a ground for heavy civil damages. And yet the Massachusetts statute holds over the employer a method of official blacklisting and boycotting which is more severe and more damaging than any private boycott ever attempted to be estab-

lished. It is absurd, in one instance, to make a certain action by individuals a heinous crime and, at the same time, in another instance, to attempt to legalize precisely the same sort of action by or under sanction of the state. The motive is, in law and in reason, just as immaterial in the one case as in the other.

#### A DISCRIMINATING AND ENCROACHING PROCESS

In Massachusetts also, as in other states attempting to enforce these statutes, different standards of living are recognized for employees in different occupations, as shown by the different wages established for the various occupations in the same state and even for different classes of employees in the same occupation. But even if each worker has a right to a living wage, whence the right of one worker to a living wage greater than that of another? More than that, the wage fixed at one time is only a step to a higher wage subsequently to be fixed. Theoretically computed on the cost of living, it is not in the end computed at all. It is fixed for each class, and from time to time, as the various Boards are influenced by the demands of the employees. One encroaching step leads to another. Even now in Massachusetts the legislature is asked to add to the inquisitorial powers of the Wage Commission and to make fine and imprisonment the penalty for non-compliance.

#### PUTS AN EMBARGO ON HOME INDUSTRIES

The statutory minimum wage is objectionable both from an economical viewpoint and from a legal viewpoint. In the first place it creates an artificial competition with the industry upon which the minimum wage is imposed. With the increased facilities for transportation, industries today compete not alone in their intrastate trade. Their markets are extrastate; their business is nation-wide, and often world-wide. Many of you have 50%, 70%, 80%, and even more, of your trade outside the limits of your state. Mr. Hapgood has said that this disturbance of business adjusts itself because the effect of the statute goes to every similar occupation or industry in the state. This is not true, either as to your interstate or your extrastate trade. Outside the state you have to meet competitors whose cost of production is not increased by an unnatural wage-cost. They, therefore, can sell at a profit outside your state, where your margin of profit is cut down by the wage you must pay in excess of its worth to you. More than that, your intrastate trade is, in the same way, destroyed by your competitors who send goods into your state, which are produced in states where

wages are fixed with some consideration of the ability of the employee to earn and of the employer to pay. Prices at which you must sell are fixed, not by the markets of the state, but by the markets of the nation—indeed, by the markets of the world. By the Federal tariff, you may, to some extent, be protected against the competition of foreign producers whose wage-cost, and, therefore, whose prices, are below yours. But no tariff is possible between the states, and in the markets of this nation your own state, through a minimum wage statute, puts an embargo upon your industry in favor of your extrastate competitors.

#### INCREASES UNEMPLOYMENT

Another evil effect is, that it increases the number of unemployed. There is no problem of labor so disturbing, and especially at the present time, as that of unemployment. Workers whose standard of efficiency is even above that of a minimum wage are without work; and, with them, are the hoards of jobless inefficient. The minimum wage statute says to the latter: "You shall not work for what you can earn, although there are jobs waiting you with fair pay for what you are able to do." The employer will not keep upon his pay-roll those whose standard of efficiency is much below the fixed wage standard. Many a woman worker who, from lack of skill, is prevented from earning more than her fair cost of living, is glad to obtain work at a wage commensurate with her ability, and thereby to supplement perhaps other means of existence or to help her parents or family to a common fund for support; or, perhaps, while earning less than a full living wage, to acquire the practical experience and skill which will enable her to demand and receive that and more. All this class are driven from their present employment and kept jobless for a long time and perhaps forever. This possible effect upon the employee is admitted by the most ardent advocates of the statutory wage. Experience has demonstrated this effect. The only industry against which a statutory minimum wage has, as yet, been enforced in this country is the brush industry in Massachusetts. One brush concern, since the minimum wage for brush makers took effect, has discharged over one hundred of its unskilled employees and has reorganized its methods of work so that its less skilled labor is done by those who also perform more skilled work; and at a total wage which is \$40,000, a year less than that paid formerly. In self-defense against the arbitrary interference of the state with its business, it is now forced to figure its wage-scales on a selfish basis, and with less

liberality for its employees. If the state dictates for the worker, the employer must look out for himself. So this brush concern in Massachusetts now exacts, more than ever before, from all its workers all the units of work commensurate with the total wages it is compelled to pay.

#### IT TENDS TO LEVEL ALL WAGES

This leads to another point. As illustrated in this very brush factory in Massachusetts, the minimum wage established by statute has the effect to lessen the advantages and the wages of the higher skilled employees. In other words, the minimum wage tends to become the maximum wage. This is by reason of the very fact of arbitrary legislative interference with wages. The only remedy for this result is, of course, that by further legislation all wages be fixed by statute and that, too, for both men and women.

#### IT PLACES THE BURDENS OF THE STATE ON ONE CLASS

And why should this contribution over what is earned be paid by the employer, simply for the reason that the individual who is on his pay-roll needs this excess over what she is able to earn? These statutes are based upon the purely ethical theory that each individual human being has a generic right to live in health, comfort and happiness and to have all that is necessary for that purpose. The obligation to furnish these is an obligation of the community as a whole. Upon what theory does the community as a whole shirk its burden and by legislation place the obligation upon the employer—the employer who pays toward that cost of living all that the employee is capable of earning, and who gives her the opportunity to turn her real efficiency into a fund for her support? If that fund measured by her efficiency is not sufficient for her proper support, then why should the employer contribute the difference any more than any other class? The duty to supply it is that of the community as a whole. But, if you are going to place that obligation upon a class, then why not level down the cost of living by compelling the farmer to produce and sell for less price the necessities of life; or the merchant, who has bought from the farmer, to sell at lower prices? The employee is no more entitled to receive his cost of living, as such, from the employer than the employer is entitled to receive his cost of living or the cost of the living of his industry, as such, from the employee. Both are entitled to live, but neither is entitled to receive the cost of living, as such, from the other.

### IT IS BASED ON THE THEORY OF DIVISION OF PROPERTY

The statutory minimum wage is objectionable upon legal grounds, some of which have already been indicated. I shall not here review the constitutional questions. But let me bring home to you, in a practical way, some of the constitutional points involved. The statutory minimum wage is based theoretically, and, in fact, by its very terms, upon the theory of division of property between those who have and those who have not. Furthermore, this compulsory division is attempted to be justified upon the theory that those benefited are entitled to their share, for the very reason that they have not; and that those whose property is divided should be compelled to divide, for the very reason that they have. The statutory minimum wage means, first, a forced contribution to be paid out of profits, so long as it can be paid out of profits, and no matter to what small margin of profit the employer may be forced. If it takes all of, or more than, his profits, then, so long as the employment continues, he must still make this contribution and that, too, of course, out of his capital. If he refuses, or is unable to pay it out of capital, then he must resort to the only other alternative, and that is that he must go out of business and be entirely eliminated as a "parasite" on the community. This statute, therefore, is based upon a theory which is repugnant to our social system and to our system of government; for it is the theory of the elimination of private property rights and of a division of all private property among and for the benefit of all individuals. It is based, in other words, upon the theory of socialism.

### REGULATION OF HOURS A DIFFERENT QUESTION

Mr. Hapgood, as other advocates of a statutory wage, refers to the Federal decisions, enforcing regulation of hours and other working conditions, and particularly those in favor of women workers, as precedents in support of these wage measures. Let me impress upon your mind the difference. When the Supreme Court sustained the Oregon statute fixing maximum hours in certain manufacturing establishments for women workers, it held that such regulation might be reasonably enacted, because greater hours were dangerous to women in those particular employments, and because more dangerous to women than to men. The fixing of maximum hours for men had been upheld only because the occupations so regulated presented, from their very nature, hazards to the workers if longer hours applied.

In every case of the regulation of hours, the protection to the worker has been against a hazard or need which arose out of the employment in question and which was peculiar to such employment. So the Factory Acts compel the employer, at his own expense, to protect the employee against the hazards of unsafe machinery, and of unsanitary conditions of work; in other words, to protect employees against hazards which are peculiar to the employment in question and which arise out of the fact of the employment. So the Workmen's Compensation Acts, at the expense of the employer, protect the employee against casualties arising out of and because of the hazards of the employment. Those needs and hazards protected against are the needs and hazards, not individual to the employee, but peculiar to the occupation regulated and are confined to those which arise out of the employment. Such regulations are upheld only for that reason; and for that reason alone, it is held that the legislature, under the police power of the state, can make and enforce such regulations.

But that is not the case of the minimum wage regulation. The need of the employee for an amount above what he earns, to make up the necessary cost of living, is a purely individual need; it is peculiar to him in his individual capacity as a human being. It exists before employment, it exists afterwards, just as much as, and even more than, during employment. It does not arise out of the employment. There is, therefore, no warrant in law, under our system of government, to compel the employer to contribute to the worker's cost of living as such. There are other individual needs which might quite as well be supplied,—sick benefits for the employee and his family, old age and non-employment pensions. These are all needs worthy of consideration and invite the most careful and conscientious effort of benevolent people. We may admit that the obligation to furnish them is one which rests upon the community, or upon the state; but that fact is no basis, either in law or reason, for the community or the state to compel one class of individuals to furnish these benefits for another class.

Even Father Ryan, in his published writings, admits that the minimum wage problem can not be solved in this country by compulsory legislation without amendments to the Federal Constitution and to the state constitutions. Yet in Boston, the other night, he intimated that the Federal Supreme Court would stultify itself if it did not hold the Oregon minimum wage statute consistent with the Federal Constitution as it is now written. Though he is an avowed antagonistic of socialism, he is so obsessed with this mini-



imum wage fallacy that he would have the Supreme Court of the United States, regardless of the Constitution, change this system of government, from one which is based upon the sanctity of private property, to a form of government which is based upon the doctrine of the destruction of both the right of private property and the liberty of contract.

#### LEADS TO PATERNALISTIC INTERFERENCE

If the legislature can fix a minimum wage, it can fix a maximum wage. If it can forbid an employee to contract for a wage commensurate with his ability, it can compel that employee to work for a wage which is less than is commensurate with his ability. If it can and does legislate minimum wages, it can and must legislate all wages, and for all occupations and for all classes of workers. If it can legislate wages, it can legislate prices,—the prices of goods produced by the farmer, the prices of goods produced by the manufacturer, the prices of goods sold by the merchant, retail or wholesale. This would introduce a paternalism in governmental affairs which would reach every detail of your private business and every transaction of trade and commerce. As American citizens you are not ready for that; but that is precisely what is meant by this sort of legislation.

#### NO RELATION BETWEEN WAGES AND MORALS

The claim that the wages and morals of the worker have any real connection has been abandoned. The Wisconsin legislative committee, in its recent report, asserts that there is no connection between wages and morals. Judge Catlin of Minnesota, in declaring the minimum wage statute of that state unconstitutional, and recognizing its result as depriving of employment women who are otherwise able to get employment, said, that if there was any connection between wages and morals, the statute in question was a statute to promote immorality.

#### EXPERIENCES IN OTHER COUNTRIES MISLEADING

My time permits only a word as to the conclusions suggested by Mr. Hapgood from the history of the minimum wage statutes in New Zealand, Victoria and England. Those statutes apply generally to both men and women. They are confined to a comparatively few industries and apply to a comparatively small number of workers. This point of difference has been forcibly presented to you this



evening by Mr. Straus. The British expert, Mr. Aves, who examined conditions in Australasia, after ten years' experience there with the minimum wage, reported that the experiment in those countries could not justify its adoption in England, much less its adoption as a compulsory measure. He said that the benefits which had been reached were primarily those of increased co-operation on the part of the employer and through voluntary action. As administered there it was not drastic nor offensive to either employer or employee.

But these experiences under a form of government different from ours are not precedents for us. In England and in Australasia the legislative discretion is comparatively unlimited. It may have the effect to confiscate property or to restrict the liberty of contract. Not so here. The limitations existing upon the powers of legislation in this country are those very restraints which were intended to protect, and have, in fact, protected, the rights of life, liberty and property in this country more fully than under any other government. Violence of these restraints upon legislation means violence to the very protective features of our form of government. It is a violence destructive of the security, which you and I and every citizen enjoy, that our fundamental rights shall not be divested or infringed upon by the passing whim of majorities.

The statutory minimum wage establishes a system of legislative interference with individual rights of property and of contract, repugnant to the rights and interests of both employer and employee. The employer who has studied the measure rightly regards it as an unwarranted menace to his business. Employees and their representatives, who appreciate its real significance, perceive the fact that a compulsory wage leads necessarily to compulsory employment; in the words of Samuel Gompers, it tends toward slavery. Intelligent students of industrial problems—President Wilson, for example,—recognize its ultimate tendency of lowering high wages, instead of raising low wages; and they view it as promotive of injury, rather than of welfare, to the community.

I conclude, therefore, that, as a social welfare measure to be worked out by organization, co-operation, enlightenment and education, the object of the minimum wage is beneficent and worthy of our united and hearty support. When, however, it is enacted into a statute, either directly or indirectly compulsory, it becomes a measure which is repugnant to the interests of both employer and employee. It becomes a measure which is unworkable and fundamentally vicious. Its enactment is a long step toward the establishment of socialism.

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# *The Statutory Minimum Wage*

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# *The Statutory Minimum Wage*

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THE Oregon minimum wage cases (Stettler v. O'Hara and Simpson v. O'Hara), in which the constitutionality of the statutory minimum wage will be determined, were submitted in the Federal Supreme Court December 17th, last. The decision undoubtedly will be announced next October. In the meantime the general attitude of those who are interested in these questions is that of waiting. Wage commissions, generally, have been postponing action; legislatures, generally, in which similar measures have been offered, have also been postponing action. Had the writer supposed last March that those cases were not to be decided before this time, he also would have postponed action; and would not then have promised to discuss the question for this issue of Case and Comment.

## **Minimum Wage Legislation**

In 1912, Massachusetts (chap. 706, Acts 1912; and 330 and 673, Acts 1913) passed a so-called noncompulsory minimum wage statute; and the wage commission of that state has since been attempting to apply it to various occupations. In 1913, Nebraska (chap. 211) adopted the Massachusetts statute of 1912. In 1913, compulsory statutes were passed in Colorado (chap. 110), Minnesota (chap. 547), California (chap. 324), Oregon (chap. 62), Utah (chap. 63), Washington (chap. 174), and Wisconsin (§ 1729, 1-12 Stat. 1913; chap. 712, Laws of 1913). In 1915, Arkansas adopted a similar statute (chap. 191),

and Idaho provided for a commission to investigate the question (chap. 136). While the Oregon courts upheld the statute of that state, the similar statute in Minnesota was held unconstitutional by Judge F. M. Catlin, of the state district court, on November 23, 1914 (A. M. Ramer Co. v. Evans and Williams v. Evans, which cases are now awaiting decision in the state supreme court).

## **Confusion of Terms**

As usual, especially when the rights or obligations of labor are concerned, there have been, in the discussion of this question, much confusion of terms and much playing upon words, both by the layman and by the lawyer. We read much of "the right of workers to receive the necessities of life," of "living wage," of the "minimum cost of living," of "wards of the state," and of "public welfare,"—and other phrases, the very enunciation of which is too often assumed to conclude an argument.

It is one thing to say that an individual has a right to be sustained in health and comfort, and to have that right supplied by the state or by the community in which he lives; and another thing to assert that that right is one which must be supplied by the person who happens at any time to bear the relation of employer to the one asserting the right in question. It is one thing to say that higher wages, in any particular occupation, would benefit a large number of the community, and therefore would benefit the community itself,—that is, would promote the public welfare; and another thing to assert that, for that reason alone, the state can and should legislate higher wages in private employment, and that such legislation must be upheld by the courts.

## The Statutory Minimum Wage Defined

The compulsory minimum wage statute, such, for example, as that of Oregon, compels the employer in any occupation to pay, and compels the employee to demand for her work,—regardless of the efficiency of the employee, or of the worth of her work to the employer, or of the ability of the employer to pay,—at least, a wage equal to the amount necessary to furnish to the worker the cost of living in health and comfort. This minimum wage, it is provided, shall be fixed as to each occupation by a commission; and, when so fixed and promulgated, any employer in that occupation who pays less to any worker is subject to the penalty of imprisonment or fine, or both. Such are the statutes of Minnesota, Wisconsin, Colorado, California, and Washington, and others of the states mentioned. In Utah no intervention of a commission is provided; but the statute fixes a flat minimum rate for women workers. In Massachusetts and Nebraska, there is no penalty of fine or imprisonment for failure of the employer to meet the requirements of the statute. He is published, under state sanction, as a recalcitrant, and the publication of the official list is made compulsory upon newspapers. This latter sort of statute has been termed the “noncompulsory” minimum wage statute.

### Compulsion by Blacklisting

But such a statute as that of Massachusetts is, in effect, most obnoxiously compulsory. In its practical application, it is more repugnant to the business sense of the community, as well as to established law, than the apparently more drastic statutes of Minnesota and Oregon. This could not, as well as now, be said of the Massachusetts statute a year ago, before its viciousness had been demonstrated by practice. The state commission and its wage boards become mere instruments for carrying out the demands of the employees. In terms, the statute affords employers a hearing upon the question of the reasonableness of the wage fixed and of their ability to pay. In practice, all such considerations are cast aside, including evidence of

facts, except in so far as they accord with the preconceived notion as to what the wage should be in order to give to the employees all that they demand, and to take from the employers irrespective of their ability to pay. If an employer fails to pay the wage fixed, he is published throughout the state. The statute makes it a crime for any newspaper publisher to refuse thus publicly to blacklist an employer. He may be compelled thus publicly to hold up to censure his own relative, or his best paying advertiser—or even himself. Such a statute holds over every employer the threat of an official public blacklist and boycott, more severe and more damaging than any private boycott ever established.

Again, in practice, the Massachusetts statute results in discrimination. Its wage boards and commission fix different wages for different occupations, and even for different classes of employees in the same occupation. As the wage is fixed irrespective of the earning capacity of the employee, and is theoretically based upon the *individual* cost of living, then why has one worker a right to a living wage greater than that of another? The fact is that, although theoretically computed upon the basis of a living wage, it is not computed at all. It is simply fixed for each class, from time to time, as the various boards are influenced by the demands of the employees. Moreover, each wage when fixed, is only a stepping-stone to a higher wage. Each class of employees is constantly seeking an increase, regardless of any basis of computation, and particularly regardless of the worth of the employee to the employer.

### Experiments Elsewhere

The advocates of the minimum wage never fail to cite the so-called minimum wage statutes of New Zealand, Victoria, and England, as demonstrating both the economic advisability and the constitutionality of such statutes in this country. The experience, however, with these statutes in other countries, does not support the claims made, either economic or otherwise. They are there confined to comparatively few industries, and apply to a very limited number of workers.

After ten years' experience in Australasia with the statutory minimum wage, the British expert, Mr. Aves, who was sent by his government to examine conditions, reported that the experiment in those countries would not justify the adoption of a compulsory statute in England. From the legal view point the enactment and enforcement of minimum wage statutes in England and in Australasia establish no precedent or authority for that sort of legislation in this country. Those countries have no limitations upon the power of legislation such as exist here, the very existence of which here makes our form of government what it is, a constitutional democracy with express written limitations upon legislative powers, — limitations which were established and are maintained to preserve to every individual, beyond the danger of encroachment by legislatures, his fundamental rights of liberty of contract, the right of property, and the right to be protected against arbitrary oppression or confiscation. In those countries the power of the legislature is paramount. In our country the power of legislation is expressly limited; and the fundamental constitutional law is paramount.

## The Liberty of Contract

The minimum wage statute says to the employer: You shall not employ, or contract to employ, a worker in your industry, except on the condition that you shall pay not less than so much per week. At the same time it says to the employee: As a condition of your mak-

ing a contract to work in any occupation, you shall demand that you receive so much per week. Neither party can take into consideration any element except the mere fact that a state wage commission has fixed the price for work. It matters not that the employer could not pay such employee, and others of the same class, the wage fixed, and remain in business. It matters not that the employee in question is incapable of performing work which is a fair return for the wage fixed. Both are barred, under penalties, from making a contract which they mutually desire to make, and which would be for their mutual interests. If a different contract is made, then the statute steps in and changes the contract and compels enforcement as so changed. We, have, then, a statute which, from

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the view point of the employer, not only infringes his right of contract, but also deprives him of his property without due process of law. We have a statute which, from the view point of the employee, deprives him of his right to work and to make contracts for his work, and which therefore compels him to stay out of work unless he shall obtain a contract containing the prohibitive terms imposed on him. Such legislation encroaches upon the rights of individuals in the conduct of their private affairs.

In the recent case of the Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. (decided July 20, 1915, by Judge Hough, in the United States district court of the southern district of New York), the right of a manufac-



turer to refuse to sell his goods was held paramount to any statutory prohibitions. It was held that the Congress could not give to one party the right to compel another party to sell goods of the latter's manufacture. In the words of Judge Hough: "If the Congress has sought to give one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property. Using the words "sell or sale" conceals the issue. If a man prefers to keep what he has, an offer of money to salve the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Company is a purely private concern, except as regulated by its creating law; it is an ordinary merchant whose business is affected by no public use whatever. The statute as construed by plaintiff descends upon that private merchant, and commands him to make a contract by which he transfers his property for a price, but against his will. The contract and the price are legally mere surplusage,—the constitutional violation lies in the compulsion, whereby he is deprived of his property for a private purpose. . . . Neither the nation nor any individual can take away its property with or without compensation for the private use of anyone."

### Not Within the Police Power

The minimum wage statutes in this country generally apply to women workers, although in some states they are also extended to minors and apprentices of either sex. Most advocates of a statutory wage base their claim of constitutionality upon the police power of the state. They urge, as controlling precedents, the various decisions upholding regulation of hours and of working conditions. Such advocates forget that "there is a limit to the valid exercise of the police power by the state," and that "the mere assertion that the subject relates to the public health does not necessarily render the enactment valid;" and that "a public welfare or public health statute, in order to be held valid as an exercise of a police power, *must have a*

more direct relation as a means to an end, and the end itself must be appropriate and legitimate." *Lochner v. New York*, 198 U. S. 45, 56; also dissenting opinion, p. 68, 49 L. ed. 937, 941, 946, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

However one may view the *Lochner* decision, this principle there announced, as to the limit of the exercise of the police power, has been consistently followed in all cases pertaining to the statutory regulation of occupations. The regulation of hours in *public* employment has been upheld as not involving the question of police power of the state. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. Regulation of hours in *private* employment, fixing maximum hours for men or for women in any occupation, has been upheld *only*, because the particular occupations so regulated involve hazards to workers if longer hours applied. *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957. In all such cases the protection to the worker is one against hazards or needs which arise out of the employment in question, or which are peculiar, in such employment, to the particular class of employees to whom the regulation is applied. The factory acts impose expense and regulation upon the employer to protect employees against hazards of unsafe machinery and of unsanitary conditions of work,—hazards only which are peculiar to the employment in question, and which arise out of the fact and nature of the employment. Again, workmen's compensation acts protect the employee at the expense of the employer against casualties arising out of and because of the hazards within the employment. All these statutes have been upheld only for the reason that, while enacted as an exercise of the police power for the protection of health, morals, and public welfare, they have, in their application, a real, substantial relation between the protection sought and the needs and hazards arising out of and because of such employment. The regulation of rates of common carriers, and other regulations of quasi-public enterprises, have no application here.

Munn v. Illinois, 94 U. S. 125, 24 L. ed. 84.

### The Statutory Wage Distinguished

But the need of a "living" is an *individual* need. It exists before employment, and during employment, and after employment. The need in question here is diminished during employment to the extent that the actual wage obtained contributes to the amount necessary to supply the cost of living. The hazards and dangers arising from this individual need are less during and because of employment than they are without employment. They are without real or substantial relation to the fact of employment or to any particular employment. Even if we admit the ethical and economic view point, that each individual has a "generic" right to receive the full cost of living in health and comfort, it does not follow that another individual is or can be obligated to supply that need, simply because there is the relation between the two of employee and employer.

Here is the crux of the question, so far as the constitutionality of the statutory minimum wage is concerned. If the employer can by statute be compelled to supply in full this individual need, because the one to be benefited happens to be on his pay roll, then there is no limit to which the property of the employer can be taken to supply this and other needs which are purely individual. He could as well be compelled to provide sickness benefits, not only for the employee, but also for his children and for all dependent on him. He could be compelled to provide old age benefits for the employee and for his family. He could as well be compelled to submit to a division of his property with those who are or have been on his pay roll,—all because such division would conduce to the health, comfort, and happiness of his employees, and because some legislative body has chosen to view such legislation and its enforcement as either immediately or ultimately conducive to the "public welfare."

Indeed, it is argued in support of these statutes, that, when a legislature has enacted its economic views as to what is, or is not, for the "public welfare," then it

is beyond the power of the courts to say that the legislature is not right; and further that it is beyond the power of the courts to deny the pronouncement of the legislature that the regulations in question have a real and substantial relation to the objects professedly sought to be accomplished.

### These Statutes are Socialistic

What is or is not for the "public welfare" depends upon the view point. Discussing the question as one which is purely ethical or economic, we may agree or differ without encroaching upon questions which involve the stability of our form of government. The fact is too often overlooked, however, that when our government was established, its makers, wisely as most of us believe, deemed that it was and would ever be for the public welfare that the fundamental law should express certain limitations upon legislative power. That belief was written into our Federal Constitution. Any view of the public welfare, as an abstract proposition, which conflicts with the view thus established as the foundation of our government, must, until changed by constitutional amendment, be regarded as impossible of enforcement by the courts. The socialists would change our form of government; and they frankly admit that a radical change of the Constitution is necessary before their view of what is public welfare can be realized. They would establish a government under which the rights of private property, the sanctity of which is the very basis of our present form of government, are eliminated, and under which, by legislative action through majority vote, a division of property can be enforced. They would open the door to unlimited confiscation of private property by the state, and to such disposition of the same between property holders as the legislature shall dictate. While, however, our present form of government lasts, such arbitrary and uncompensated deprivation of private property cannot be brought about.

But it is precisely such sort of division of property which is the basis of the statutory minimum wage. It means a forced contribution by one person

one class of persons, to another person, or to another class of persons, to supply the individual needs of the latter. It is a forced contribution, under the guise of wages, as to every cent of wage imposed beyond the fair worth of the work furnished by the employee in return. The socialistic nature of these statutes is demonstrated by their advocates, who assert that an employer should be compelled to pay the full minimum wage established, even if it takes away all his profits. Indeed, they assert that, if he cannot pay it out of profits, then he should pay it out of capital. This means nothing less than a division of property itself between the one who has and the one who has not; and that, too, merely because one has and the other has not. Moreover, the same supporters of the minimum wage assert that, if the employer must, in order to pay the wage, pay it out of his capital investment, then he must do so, or resort to the only alternative,—that is go out of business. They would then say good riddance to him, as a “parasite” on the community.

### Economic Objections

The objections upon economic grounds are even more convincing. The statutory minimum wage puts an embargo upon home industries. Competition today is not confined to intrastate trade. Prices are determined by the markets of the entire country, indeed, of the world. Most manufacturers, and a great many wholesale and retail mercantile houses, have the larger part of their trade outside the limits of their own state. They have to meet competitors whose cost of production is not arbitrarily raised by an artificial wage cost. This means unequal competition as between home industries and those outside of the state, and also as against those of foreign countries. Any state which passes a minimum wage statute puts an embargo on its own industries in favor of extra-state competitors.

Again, the inevitable result of the enforcement of the minimum wage statute is to drive the worker out of employment, rather than to increase the advantages of employment. The employer cannot, and will not, for any con-

siderable length of time, keep employees on his pay roll whose efficiency is below the standard of the fixed minimum wage. The employee is forbidden to work for what he can earn. The employer is forbidden to employ the worker for what the latter is worth. The inevitable result is that either the employer must go out of business, or the employee must go out of employment; and if the former result occurs, then the latter inevitably follows. The worker who is not capable of earning the full minimum wage would nevertheless be glad to work for what he is worth. In many cases his wages are sufficient to support himself. Together with what other members of the family earn, there is obtained an ample fund to support all in health and comfort. But all such are ~~driven~~ from employment and kept jobless, unless, at their own expense and without the assistance of employment in the meantime, they shall achieve a standard of efficiency equal to that of the minimum wage.

This effect upon the employee class has been demonstrated by experience. The first industry in the United States to have applied to it the statutory minimum wage was that of the brush making industry in Massachusetts, in which, from its very nature, an unusually large number of unskilled workers are employed. One brush concern, after the minimum wage for brush makers took effect, discharged over one hundred of its unskilled employees. Then it reorganized its methods of work so that the less skilled labor is done by those who also perform more skilled work. The total wage, however, is \$40,000 a year less than that paid before. Many other of the brush concerns in Massachusetts discharged a large number of their employees who were incapable of earning the wage fixed. An investigation six months afterwards showed that two thirds of the workers so discharged had not since been able to get employment in any line of work at any price, and that many were engaged in other employments where a minimum wage was not yet fixed, and were receiving less than when discharged from their work as brush makers.

Thus, the arbitrary minimum tends more and more to become the maximum, to the disadvantage of the skilled employees entitled to the higher wages. The statutory minimum wage tends to level all wages. This would necessitate another remedy, which would be consistent if a minimum wage can be fixed, and that is that all wages be fixed by statute.

Indeed, if the legislature can fix the price of labor in private employment irrespective of its worth, and irrespective of the ability of the employer to pay, there is no reason why the same legislature, upon the same principle, or lack of principle, cannot fix the price of all things which are now subject to private contract. It could fix prices of goods sold by the merchant, of the machinery which is sold by the manufacturer, and of all commodities.

### Wages and Morals

Judge Catlin, of Minnesota, in the decision already cited, says: "But there is no reasonable foundation for holding this act to be necessary or appropriate to protect the safety, health, or morals of working women, nor is it reasonably calculated to promote the general welfare of the public in the manner claimed by its advocates. On the contrary, it is quite as likely in actual results to increase both distress and immorality, if morals are dependent on wages. Hence, it is not a valid police regulation."

It follows, of course, that if insufficient wages during employment produce immorality, then lack of employment and the consequent lack of any wages would produce more immorality.

This claim that minimum wage statutes are protective of the morals of women workers was most sensationally asserted a year or two ago at the beginning of the minimum wage agitation in this country. But careful investigation has shown that there is no relation between wages and morals. The reasons are obvious.

### Paternalistic Interference

The chief cause of the continued agitation for this measure, which is a men-

ace both to the employee and the employer, is that many persist in advocating what the workers *think* they want, instead of instructing those whose interests they assume to represent as to what is really for their benefit. Such course lends to the sensationalist an opportunity to indulge in sentimental platitudes concerning the hardships and needs of the worker and his failure to receive his proper share of the world's goods. Questions of charity are confounded with questions of law. The benevolence of the living wage, ethically viewed, cannot be disputed. For this reason the author of "A Living Wage," so long as he confined himself to purely ethical considerations, was unanswerable. Upon the economic phases of the question he was also to some degree convincing. In his book he expressly recognizes the fact (pp. 313, 314) that "changes in the Federal Constitution and in the Constitutions of the several states would be a preliminary requisite to any such legislation." But later, in his speech at Ford Hall, in Boston, on February 7th, last, Father Ryan predicted dire results to the judiciary of this country if the Federal Supreme Court shall hold such legislation unconstitutional. (See the "Survey" of March 13, 1915, page 660; also of April 10, 1915, page 56.)

The sentimentally sensational view point, which brushes aside with a catchphrase or an epithet all considerations of law and economics, is presented by another writer of recognized ability in his way, but whose discussions of the subject serve only to exploit an extensive vocabulary and a somewhat exceptional gift at phrase-making. (See "The New Republic" of March 27, 1915, supplement; also of July 3, 1915, page 221.) Such advocates as Walter Lippmann easily pass over the real essence of the controversy which is involved in the question of a statutory minimum wage. They choose not to see that the fixing of a minimum wage is of itself in a measure the fixing of a maximum wage, and that the fixing of a minimum wage by the legislature must in the end require, and at the same time justify, a legislative fixing of maximum wages, and that that must be followed by the

statutory fixing of the prices of all commodities.

If the legislature can forbid an employee to contract with an employer for a wage commensurate with his ability, it can compel that employee to work for a wage that is less than is commensurate with his ability. The principle of compulsory wage necessarily involves the principle of compulsory employment. For that reason, beside others, the leading representatives of labor, and particularly of the trades unions, shrink from the statutory minimum wage as a step toward slavery. Mr. Samuel Gompers, president of the American Federation of Labor, has so expressed his views in unqualified terms. President Wilson and others, who have studied the question from an impartial view point, recognize that the ultimate tendency of the statutory minimum wage is to lower high wages rather than to raise low wages. They view <sup>such</sup> statutes as derogatory to the interests of the workers and of the community as a whole.

### Such Statutes Unworkable and Unenforceable

It is unnecessary to detail the inconsistencies of the various statutes enacting a minimum wage, wherein a different standard of living is made the basis for the wage as to different classes of workers, all of whose actual standards of living are the same. Every wage commission and wage board has been confronted with unsurmountable obstacles in attempting to make practical application of these statutes.

Experience has proven not only that, from the view point of economics, the minimum wage statute is unworkable and repugnant to the interests of both employee and employer, but also that, when applied, it deprives both the employee and the employer of rights of liberty and of property which are vouchsafed in this country by fundamental law.

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# OREGON MINIMUM WAGE CASES

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THE constitutionality of the statutory minimum wage in private employment, so far as its repugnance to the federal constitution is concerned, is yet an open question. On April 9th, last, the United States Supreme Court, only by reason of an equally divided court, affirmed the judgments of the Oregon state supreme court, in the so-called "Oregon Minimum Wage Cases,"<sup>1</sup> wherein the Oregon minimum wage statute had been held to be not in contravention of the federal constitution.

## HISTORY OF THE OREGON CASES

The final judgments by the Oregon court in these cases were rendered, one in the month of March, and the other in the month of April, 1914. Both cases were applications for permanent injunctions against the enforcement of the Oregon statute, based upon the claim that that statute had the effect to deprive plaintiffs of their property without due process of law and to infringe the right of liberty of contract, contrary to the fourteenth amendment. The *Stettler Case* was brought by a manufacturing employer, and the *Simpson Case* by an employee of Stettler. Judgment in the Oregon cases had been entered on demurrer,<sup>2</sup> and

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1. *Stettler v. O'Hara, et al., and Simpson v. O'Hara*, affirmed by equally divided court, U. S. Supreme Court, April 9th, 1917; 37 S. C. R. 475.

2. *Stettler v. O'Hara*, (1914) 69 Ore. 519, 139 Pac. 173, Ann. Cas. 1916A 217; *Simpson v. O'Hara*, (1914) 70 Ore. 261, 141 Pac. 158.

practically the only question before the courts was the federal question involved. The cases were immediately taken to the United States Supreme Court on writ of error and advanced for argument at the October, 1914, term of that court. They were fully argued, with extension of time, on the 17th and 18th days of December, 1914; Louis D. Brandeis, of Boston (now Mr. Justice Brandeis), and Attorney-General A. M. Crawford, appearing for the defendants, and Rome G. Brown, of Minneapolis, and C. W. Fulton, of Portland, Oregon, appearing for plaintiffs. No decision was filed upon this argument, and in July, 1916, the cases were ordered by the court to be reargued at the October, 1916, term. That reargument was had on January 18th and 19th, 1917, again with extension of time; Professor Felix Frankfurter, of the Harvard Law School, appearing for the defendants and the same attorneys as in the previous argument appearing for the plaintiffs.

#### MINIMUM WAGE LEGISLATION IN THE UNITED STATES

These cases were the first minimum wage cases to be taken to the federal Supreme Court. Their importance, especially if a decisive result had been reached, is shown by the present status of minimum wage legislation in the United States.

Such statutes have been passed in the following states: Massachusetts, 1912;<sup>3</sup> Minnesota, 1913;<sup>4</sup> Nebraska, 1913;<sup>5</sup> Arkansas, 1915;<sup>6</sup> California, 1913;<sup>7</sup> Colorado, 1913;<sup>8</sup> Oregon, 1913;<sup>9</sup> Utah, 1913;<sup>10</sup> Washington, 1913;<sup>11</sup> Wisconsin, 1913.<sup>12</sup> In 1915, also, Idaho provided for a commission to investigate the question, but has not as yet passed any minimum wage statute.

With the exception of the statutes of Massachusetts, Nebraska, Arkansas and Utah, these minimum wage statutes are substantially in the terms of the Oregon statute. All these statutes purport to be based upon the police-power regulation of occupa-

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3. Mass. Acts 1912 Chap. 706; Mass. Acts 1913 Chaps. 330 and 673.

4. Minn. G. S. 1913 Chap. 547.

5. Neb. Laws 1913 Chap. 211.

6. Ark. Laws 1915 Act 191.

7. Cal. Statutes 1913 Chap. 324.

8. Colo. Laws 1913 Chap. 110.

9. Ore. Laws 1913 Chap. 62.

10. Utah Laws 1913 Chap. 63.

11. Wash. Laws 1913 Chap. 174.

12. Wis. Rev. Stat. 1913 Section 1729s—1 to 12, Laws 1913 Chap. 712.

tions in the interest of "public welfare, safety, health and morals." In each case, their concrete object is to provide for women workers a wage which shall not be less than that which is considered required to supply each female worker, as an independent supporter of herself, such full "living wage" as will keep her in health and comfort. Such exercise of police-power regulation is based on the claim that the supplying, to an individual who happens to be an employee in any occupation, of the needs of such individual for a comfortable living, makes the occupation in question "affected with a public interest," and, therefore, subject to the wage regulation in question.

The Massachusetts statute authorizes a commission to investigate and determine the wages of female workers in any industry or occupation which are necessary to supply to such workers the cost of living and to maintain them in health. The commission has the same power as to the wages of all learners or apprentices, of either sex, and of all minors below eighteen years of age, of either sex. The wage so found is not directly compulsory upon the employer; that is, there is no fine or imprisonment for failure to pay that wage.

The penalty upon an employer for not paying the prescribed wage is, that the commission publishes the recalcitrant employer in newspapers, and the publication of such official list is made compulsory upon the newspapers. The only remedy allowed the employer is, that he may come into court and assume the burden of proof of showing that the prescribed wage is such as not to leave him a fair profit. If he is successful in so showing, then the court may restrain the commission from the publication provided. The remedy is individual to each employer.

This method of coercion was intended to obviate the constitutional objections raised to directly compulsory statutes. In its practical application, it is more repugnant to the business sense of the community, as well as to established law, than the apparently more drastic statutes of Minnesota and Oregon. This can now be better said of the Massachusetts statute than it could be a year or two ago, before its viciousness had been demonstrated by practice. The state commission and its wage boards become mere instruments for carrying out the demands of the employees. In terms, the statute affords employers a hearing upon the question of the reasonableness of the wage fixed and of their ability to pay. In practice, all such considerations are cast aside, includ-

ing evidence of facts, except in so far as they accord with the preconceived notion as to what the wage should be in order to give to the employees all that they demand, and to take from the employers irrespective of their ability to pay. If an employer fails to pay the wage fixed he is published throughout the state. The statute makes it a crime for any newspaper publisher to refuse thus publicly to blacklist an employer. He may be compelled thus publicly to hold up to censure his own relative, or his best paying advertiser—or even himself. Such a statute holds over every employer the threat of an official, public blacklist and boycott, more severe and more damaging than any private boycott ever established.

Again, in practice, the Massachusetts statute, as also all minimum wage statutes, results in discrimination. Its wage boards and commission fix different wages for different occupations, and even for different classes of employees in the same occupation. As the wage is fixed irrespective of the earning capacity of the employee and is theoretically based upon the individual cost of living, then why has one worker a right to a living wage greater than that of another? The fact is that, although theoretically computed upon the basis of a living wage, it is not computed at all. It is simply fixed for each class, from time to time, as the various boards are influenced by the demands of the employees. Moreover, each wage, when fixed, is only a stepping-stone to a higher wage. Each class of employees is constantly seeking an increase, regardless of any basis of computation, and particularly regardless of the worth of the employee to the employer.

The results of the application of the Massachusetts statute have justified the objections to such legislation based upon economic as well as upon constitutional grounds. The first industry in the United States to have applied to it the statutory minimum wage was the brush-making industry in Massachusetts, in which, from its very nature, an unusually large number of unskilled workers are employed. One brush concern, after the minimum wage for brush makers took effect, discharged over one hundred of its unskilled employees. Then it reorganized its methods of work so that the less skilled labor is done by those who also perform more skilled work. The total wage, however, is \$40,000 a year less than that paid before. Many others of the brush concerns in Massachusetts discharged a large number of

their employees who were incapable of earning the wage fixed. An investigation six months afterwards showed that two-thirds of the workers so discharged had not since been able to get employment in any line of work at any price, and that many were engaged in other employments where a minimum wage was not yet fixed, and were receiving less than when discharged from their work as brush makers.<sup>13</sup> The Massachusetts courts have been holding their decision as to this statute's constitutionality, awaiting the United States Supreme Court's decision in the Oregon cases.

The Minnesota statute prohibits any employer from employing any "worker" at less than a "living wage." "Worker" is defined to mean a "woman . . . employed for wages"; that includes, also, minors (of both sexes), a woman or minor learner, and a woman or minor apprentice. "Living wage" is defined as "wages sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."

In Minnesota a commission was formed and proceeded to put the statute in operation, but was enjoined by the courts in a decision holding the statute unconstitutional.<sup>14</sup> This decision was filed November 23, 1914, and is now in the supreme court of Minnesota, on appeal, having been argued and submitted, but held for decision awaiting decision of the United States Supreme Court in the Oregon cases.

The Arkansas statute fixes the minimum wage in the first instance directly, instead of through a commission. It provides:

"Sec. 7. It shall be unlawful for any employer of labor mentioned in Section 1 of this Act [manufacturing, mechanical or mercantile establishment, laundry, or express or transportation company] to pay any female worker in any establishment or occupation less than the wage specified in this section, to-wit, except as hereinafter provided: All female workers who have had six months' practicable [practical] experience in any line of industry or labor shall be paid not less than \$1.25 per day. The minimum wage for inexperienced female workers who have not had six months' experience in any line of industry or labor shall be paid not less than \$1.00 per day."

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13. Mass. Minimum Wage Commission. Bulletin and Annual Report; also, "The Minimum Wage—Massachusetts Experience," published, Boston, 1916, Merchants and Manufacturers of Mass.

14. A. M. Ramer Company v. Evans et al., and Williams v. Evans et al., decided in Ramsey County District Court by Judge Catlin, November 23, 1914.

Section 9 provides that females who are paid upon a piece work basis, bonus system or in any other manner than by the day, shall be paid not less than the rate specified for the female employees who are working on the day rate system. A commission is provided which, after investigation, may raise or lower the statutory rate so fixed, and establish a rate which "is adequate to supply a woman, or minor female worker engaged in any occupation, trade, or industry, the necessary cost of proper living, and to maintain the health and welfare of such woman, or minor female worker." Failure on the part of any employer to pay the rate so fixed is punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars for each day of noncompliance. This Arkansas statute has been declared unconstitutional by the lower courts of that state and on appeal the question is still pending in the Arkansas supreme court.<sup>15</sup>

The Nebraska statute substantially follows that of Massachusetts.

The California statute fixes the minimum wage as "the necessary cost of proper living and to maintain the health and welfare of such women and minors." It is generally on the lines of the Oregon statute.

The Colorado statute applies to "any mercantile, manufacturing, laundry, hotel, restaurant, telephone or telegraph business." The minimum wage is fixed on the basis of what is adequate "to supply the necessary cost of living, maintain them in health and supply the necessary comforts of life." This statute is generally on the lines of the Oregon statute.

The Washington statute prohibits employment of women workers "at wages which are not adequate for their maintenance" and authorizes the establishment of a minimum wage such "as shall be held to be reasonable and not detrimental to health and morals and which shall be sufficient for the decent maintenance of women."

The Wisconsin statute prohibits less than "a living wage," to any female or minor employee; which is defined to mean compensation by time or piece work or otherwise "sufficient to enable the employee receiving it to maintain himself or herself under conditions consistent with his or her welfare."

In Utah, the wage commission feature of other state statutes is entirely eliminated, and the statute briefly and directly makes it

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15. *Arkansas v. Crowe*, submitted 1915.

unlawful to employ females at less than a specified rate for minors, another specified rate for adult learners and apprentices, and another specified rate for experienced adults. There is no distinction between different classes of employments, and a breach of the law by any regular employer is made a misdemeanor.

There are no minimum wage statutes in either Idaho or Ohio. In Idaho, however, the legislature of 1915 provided for a commission to investigate the question of minimum wages. In Ohio, in 1912, there was adopted a constitutional amendment authorizing laws establishing minimum wages.

### THREE CLASSES OF STATUTES

From the above summary it will be seen that the statutes of Massachusetts and Nebraska are on a different basis from those of the other states. The statute of these two states has been sometimes termed a "non-compulsory" statute, because it does not, under a direct penalty upon the employer, compel the adoption of the minimum wage fixed by the commission, but compels newspapers to publish the delinquent employer as a recalcitrant. It is obvious that such a statute is indirectly and drastically compulsory, and that, too, by an attempt to legalize a compulsory black-list. This question was not directly involved in the discussion of the Oregon cases, although it is now pending before the Massachusetts courts.

The statutes in the states other than Massachusetts and Nebraska are directly compulsory and penal in their provisions. These others, however, are of two kinds: (1) those in which the statutory wage is fixed by a commission through wage boards, and whose final promulgation of the wage in any employment is binding upon the employer; and (2) those, of which there are two, Arkansas and Utah, in which the terms of the statute fix in precise figures the statutory wage, without providing for the intervention of a commission in the original instance.

### UNCONSTITUTIONAL FEATURES

While differing somewhat in detail, the main provisions of the Oregon statute are followed in the statutes of all these other states, except, as already stated, in Massachusetts and Nebraska, and in Arkansas and Utah. The main objections to its constitutionality are: (1) it fixes a wage based solely upon the individual needs of the employee, measured not by anything which has relation to the fact of employment or to the particular occu-



pation in question, but measured solely by the individual needs of the person employed,—not as a worker but as an individual entitled in some way to all the funds necessary to supply her needs in accordance with an arbitrary standard of living; (2) it puts the burden on the employer to supply these individual needs to the extent that the money required therefor is in excess of what the employee earns, or can earn, or is worth; (3) it prohibits the employee from making a binding contract for work at an amount which is measured by efficiency or worth, and renders jobless those whose efficiency does not come up to that properly measured by the minimum wage fixed; (4) the statute has, therefore, the effect to deprive both the employer and the employee of their property and of the liberty of contract.

In the *Stettler* and *Simpson* cases the facts were undisputed that the employee, Simpson, was a regular worker whose efficiency was such that she was unable to earn in the occupation in question, or in any other occupation, more than \$6.00 per week, and that she was one of a large number of such employees; and that the statute in question had the effect to compel Stettler, the employer, to pay her not less than \$8.64 per week, and also had the effect to prevent her from making any contract for employment at \$6.00 per week, or any other sum less than \$8.64.

This is a good example of the effect of these minimum wage statutes, although rates at which the minimum wage is fixed vary in different states and vary according to raises which may be made from time to time by the wage commissions.

#### ARGUMENT FOR UNCONSTITUTIONALITY

The theory on which the Oregon statute was held constitutional by the supreme court of that state and on which theory the main argument for its constitutionality is based, is that it is police-power regulation supportable on the same theory that statutory regulation of maximum hours of employment has been upheld. The fact, which is apparent, that the regulation attempted involves to some extent the deprivation of property and of liberty of contract is admitted; but it is claimed that this statute comes within the well established rule that such deprivation of property or of liberty does not make the statute repugnant to the fourteenth amendment, if such deprivation is one which is only incidental to a proper exercise of the police-power of regulation,—under the rule that the rights of property and of contract

protected by the federal constitution are not absolute and unyielding, but are "subject to limitation and restraint in the interest of the public health, safety, and welfare, and such limitations may be declared in legislation of the state."<sup>16</sup> And numerous instances of regulation of occupations at the expense of the employer are cited as precedents controlling in this instance.

Such argument overlooks the distinctions expressly made by the federal Supreme Court in supporting state legislation regulating occupations or business in different ways.

The declaration by a state legislature that an attempted regulation of a business is enacted in promotion of the public health, safety or welfare, does not render the enactment valid as a police regulation. There is a limit to the valid exercise of the police-power of the state. A public welfare statute must have a direct relation as a means to an end, and the end itself must be appropriate and legitimate.<sup>17</sup>

Regulation of hours in *public employment* does not involve the question of the state's police-power, for such regulation applies only as between the state itself, or political sub-division thereof, and its own employees.<sup>18</sup> So, of course, as to minimum wage statutes which apply only to public employment. As to *private employment* the regulation of hours is supported only because, and to the extent that, longer hours involve dangers to the safety and health of employees, arising out of hazards which are peculiar to the employment in question.<sup>19</sup>

The Factory Acts compel the employer, at his own expense, to protect all employees against hazards of unsafe machinery or of unsanitary conditions of work,—hazards only which are peculiar to the employment in question, and which arise out of the fact and nature of the employment. The Workmen's Compensation Acts protect the employee against casualties arising out of and because of the hazards of and during employment. Such statutes are sustained as a proper exercise of the police power

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16. *Coppage v. Kansas*, (1914) 236 U. S. 1, 28, 35 S. C. R. 240, L. R. A. 1915C 960.

17. *Lochner v. New York*, (1905) 198 U. S. 45, 56, also dissenting opinion p. 68, 49 L. Ed. 937, 25 S. C. R. 539; *Coppage v. Kansas*, (1914) 236 U. S. 1, 15-16, 35 S. C. R. 240, L. R. A. 1915C 960.

18. *Atkin v. Kansas*, (1903) 191 U. S. 207, 218, 48 L. Ed. 148, 24 S. C. R. 124.

19. *Holden v. Hardy*, (1898) 169 U. S. 366, 395, 42 L. Ed. 780, 18 S. C. R. 383; *Muller v. Oregon*, (1908) 208 U. S. 412, 421, 52 L. Ed. 551, 28 S. C. R. 324.

because the protection thereby given has "a real, substantial relation" to the employment itself. The state regulation of rates of public service companies, of railroads, and of insurance companies, is supported solely on the basis that these enterprises are quasi-public, or so affected with a public interest, that the regulation made is valid.<sup>20</sup>

But the need to any person of a "living" is an *individual* need. It exists before employment, and during employment, and after employment. Such need is, indeed, diminished, or supplied, during employment to the extent of the wage actually paid. Hazards and dangers that arise from this individual need are less with employment than they are without employment. The need itself is one which is a natural or purely individual need and has no origin in the fact of employment.

The statutory "living wage" is based upon the ethical doctrine that every person born into the world has a "generic right" to receive from the state, or the community in which he lives, the full means of subsistence; and more than a mere subsistence only,—he has such a right to the full means of living in health and comfort, including reasonable expenditures for pleasure and diversion. What an individual does not earn, so far as necessary to supply the living wage, must come from outside sources. The minimum wage statute says that this difference must be supplied by the one who happens to have that individual on his pay-roll; and that such employer cannot make a valid contract for employment for any less than such fixed minimum. He must contribute the balance, even if he has to pay it out of profits. If he cannot pay it out of profits then he must pay it out of capital. If his business is such that it cannot continue under such expenditures, beyond those which his business will allow, or which competition from other states will permit, then his business must cease. His business has become a "parasite" in the industrial world because it cannot finance the normal cost of its existence together with the forced contribution to the individual needs of its employees which are measured by the minimum wage.

An Arizona statute limiting the number of aliens that an employer could employ, and similar statutes, have been held unconstitutional by the federal Supreme Court on the ground

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20. *Munn v. Illinois*, (1876) 94 U. S. 113, 24 L. Ed. 77; *German Alliance Ins. Co. v. Lewis*, (1913) 233 U. S. 389, 415, 58 L. Ed. 1011, 34 S. C. R. 612, L. R. A. 1915C 1189.

that, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure."<sup>21</sup>

As to a labor union statute the same court had said:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it . . . . The employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."<sup>22</sup>

A Kansas statute attempted to prevent the condition in contracts for labor that an employee should remain a non-union man; but was held unconstitutional and the federal Supreme Court adhered to the rule laid down in the *Adair Case*, saying:

"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."<sup>23</sup>

Further support of the minimum wage statutes is attempted on the ground that they apply only to women employees and are a proper police-power regulation, because women are of "weak bargaining-power," and that, therefore, intervention of the state in respect of contracts between them and their employers, is justifiable. This argument is also completely answered in the *Coppage Case*, where the same argument was made with reference to employees generally in regard to contracts of employment. The court said:

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21. *Truax v. Raich*, (1915) 239 U. S. 33, 41, 60 L. Ed. 131, 36 S. C. R. 7, L. R. A. 1916D 545.

22. *Adair v. United States*, (1908) 208 U. S. 161, 174, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764.

23. *Coppage v. Kansas*, (1914) 236 U. S. 1, 14, 35 S. C. R. 240, L. R. A. 1915C 960.

"No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either.

"And since a State may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."<sup>24</sup>

The dissenting opinion in the *German Alliance Insurance Co. Case* denied the right to regulate insurance rates, on the ground solely that the business was not one properly termed "affected with a public interest,"—that is, it denied the fact which was the basis of the decision of the majority of the court upholding the state regulation of insurance rates. This dissenting opinion, therefore, without conflicting with any legal principle held by the majority, discussed the question of the regulation of prices, rates, wages, etc., in private businesses. On that point of law, therefore, it is a direct authority. Quoting from that opinion:

"If the price of a private and personal contract of indemnity can be regulated—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of

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24. *Coppage v. Kansas*, (1914) 236 U. S. 1, 17-20, 35 S. C. R. 240, L. R. A. 1915C 960.

the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute. . . .

"Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act, they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employee to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employee, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individuals. . . .

"For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution and which entitled the citizen freely to engage in any honest calling and to make contracts as buyer or seller, as employer or employee in order to support himself and family."<sup>25</sup>

On principle and also on authority, the minimum wage statute seems clearly to extend the power of regulation beyond the limits held to be prohibited by the federal constitution.

#### ECONOMIC OBJECTIONS

There are many economic objections to the minimum wage statute. These are not directly pertinent in a discussion of its constitutionality; but they should not be overlooked. Competition today is not confined to intra-state trade. Prices are determined by the markets of the entire country, indeed, of the world. In the case of most manufacturing enterprises the largest percentage of their trade is outside of the limits of the home state. Any local, artificial raising of the cost of production interferes with natural competition. Industries of states not interfering with wages have an advantage over those of states exercising such paternalistic interference.

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25. *German Alliance Ins. Co. v. Lewis*, (1913) 233 U. S. 389, 420-424, 58 L. Ed. 1011, 34 S. C. R. 612, L. R. A. 1915C 1189.

Again, the minimum wage statute defies the economic law of supply and demand and increases the army of jobless seekers of work. The employer will not keep employees on his payroll whose efficiency is below the standard of the minimum wage. The employee is forbidden to make a contract for what his labor is worth. He must achieve a certain standard of efficiency,—and this, too, at his own expense,—before he can get a job. He is deprived of the assistance which he might otherwise obtain by getting a job for what he is worth, and having his wage increased as his efficiency increases. If the employer, by reason of the extra production-cost imposed, has to go out of business, then all classes of his employees are rendered jobless.

As an economic proposition the minimum wage is impracticable and it tends to fix a maximum wage,—which is presumably impossible by legislation. The tendency of the effect of the minimum wage is to lower higher wages and to establish maximum wages as well. The possible wage-cost of any particular industry is limited. If a sum which is more than the work-worth of the less efficient employees is fixed as a minimum wage for them, then the unavoidable result is holding the more efficient class more precisely to the limit of their actual work-worth; and thereby the rewards for experience and efficiency, by participation in profits beyond the actual wage, are diminished. Mr. Samuel Gompers, president of the American Federation of Labor, has expressed his view that the statutory minimum wage is a step toward slavery. President Wilson, and others, recognize the fact that the ultimate tendency of the minimum wage is to lower higher wages rather than raise lower wages.

The claim was formerly asserted that the statutory minimum wage is a protection of the morals of women workers. This sensational claim has been practically abandoned. Of course, if insufficient wages during employment produce immorality, then lack of employment would tend to produce it all the more. As said by Judge Catlin of the District Court of Ramsey County, Minnesota, in the *Ramer* decision, already cited, such a statute "is quite as likely in actual results to increase both distress and immorality, if morals are dependent on wages."

#### SOME SURMISES SUGGESTED

An interesting phase of the consideration of this question by the United States Supreme Court is the question of the probable effect upon the final result caused by the changing personnel of



the court during the consideration of these cases. Whatever may be the basis of such surmise, and without any available proof to support it, it seems probable that after these cases were first submitted the court after consultation reached a decision reversing the Oregon state courts and holding that the Oregon statute was unconstitutional; that that decision was being written by Justice Lamar at the time of his sickness and death; and that such decision had been reached with five justices for reversal and four dissenting. Further, it would seem that the death of Justice Lamar left the court evenly divided, and that it was therefore decided to await the appointment of Justice Lamar's successor, whose opinion in the matter was expected to be decisive upon reargument. It happened, however, that after a long delay Justice Brandeis was appointed, but was disqualified to sit in these cases, having been of counsel in their former presentation. Then came the resignation of Justice Hughes, and this apparently left the seven remaining members of the court, who were qualified to sit in these cases, four to three in favor of the unconstitutionality of this statute. Then reargument was ordered and the appointment of Justice Clarke followed. No members of the court having changed their mind upon reargument, this left the court four to four. The final decision does not state which four favored and which opposed the constitutionality of the statute, but the writer's surmise is, that on the first submission the statute was deemed unconstitutional by Chief Justice White and by Justices Van Devanter, Lamar, Pitney and McReynolds, and was deemed constitutional by Justices McKenna, Holmes, Day and Hughes. It seems evident that in the final decision Justices McKenna, Holmes, Day and Clarke favored affirmance, with Chief Justice White, and Justices Van Devanter, Pitney and McReynolds for reversal.

#### EFFECT OF DECISION BY DIVIDED COURT

The judgment of affirmance rendered in these cases is by some assumed to constitute an authority and precedent holding that the statutory minimum wage is not repugnant to the prohibitions of the federal constitution. Such is not the case. The question of constitutionality is still an open one, so far as the federal courts are concerned, and also so far as all state courts are concerned, except, of course, in Oregon where it has been upheld by the state supreme court. The rule in the United States is that, a decision by a divided appellate court operates to affirm the decision

reviewed, and determines the rights of the parties in the particular case, but does not establish a rule of law which has the force of precedent either in the same court or in inferior courts.<sup>26</sup> In such case no opinion is handed down and the decision is simply one of "affirmance by a divided court," without settling the principles of law which were at issue before the court.<sup>27</sup>

It may be expected, therefore, that the Minnesota state supreme court will disagree with the Oregon supreme court and uphold the decision of Judge Catlin in the *Ramer Case*; and also that the decision of the lower courts of Arkansas against the constitutionality of the minimum wage statute of that state will be upheld.

This sort of legislation is a new expression of the paternalistic and socialistic tendencies of the day. It savors of the division of property between those who have and those who have not, and the leveling of fortunes by division under governmental supervision. It is consistent with the orthodox socialist creed, but it is not consistent with the principles of our government which are based upon the protection of individual rights. After long study and discussion of the subject, such legislation still seems to the writer to be a long step toward nullifying our constitutional guaranties.

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26. *Hertz v. Woodman*, (1910) 218 U. S. 205, 213-214, 54 L. Ed. 1001, 30 S. C. R. 621.

27. *Etting v. Bank of United States*, (1826) 11 Wheat. (U. S.) 59, 78, 6 L. Ed. 59; *Durant v. Essex Co.*, (1868) 7 Wall. (U. S.) 107, 113, 19 L. Ed. 154; *Kinney v. Conant*, (1909) 92 C. C. A. 410, 166 Fed. 720, 721; *Westhus v. Union Trust Co.*, (1909) 94 C. C. A. 95, 168 Fed. 617, 618.

**PRICE MAINTENANCE**

**(Pamphlet 40).**



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## THE RIGHT TO REFUSE TO SELL

*"It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern."*<sup>1</sup>

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"We have not yet reached the stage, where the selection of a trader's customers is made for him by the government." This is the cogent sentence which closes, and at the same time summarizes, the opinion of Judge Lacombe, speaking for the United States Circuit Court of Appeals, of the Second Circuit, in the recent decision in a case which has already become an epoch-making one in the law of trade relations in this country.<sup>2</sup> This decision, and the decision of the U. S. District Court, of which it is an affirmance, establish the right of a private trader to refuse to sell as a constitutional property right which cannot be taken away by legislative interference, either state or national.

In that case, the defendant marketed under its own trade-marked name and brand its own peculiar selection of a well-known commodity which is constantly produced in the manufacture of flour and in such quantities that the particular selection in question consumed only an insignificant portion of the available supply. By maintaining the dependability of its selection, as to quality, and by establishing its reputation with the ultimate consumer, it had made its brand of great celebrity and, therefore, of great value. It delivered its goods to its customers at a uniform price throughout the country, absorbing freight charges and diminished profits due to variations in the market price of the commodity from which its selection was taken. It

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<sup>1</sup>Cooley on Torts, p. 278.

<sup>2</sup>*The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, decision by the U. S. C. C. of A., Second Circuit, filed Nov. 10, 1915, 227 Fed. Rep. 46; affirming the decision in same case of U. S. Dist. Ct., Southern Dist. of N. Y. (by Judge Hough), filed July 20, 1915, 224 Fed. Rep. 566.

sold directly to jobbers and the latter sold to retailers from whom the consumer purchased, and the prices to its direct vendees and from the latter to their vendees, were scheduled so as to allow a fair profit to the retailer in his dealings with the ultimate consumer. It did not attempt to control the resale price by any contract or condition subsequent, applicable to any goods after they had passed out of its hands; but, by its system of distribution and sale, expressly reserved the right to refuse to sell to any customer who did not comply with its reasonable requests. In other words, it impliedly announced its intention of refusing to sell, so far only as further sales were concerned, to any customer who, as to goods already sold, engaged in cut-price practices, to the injury of its reputation and that of its brand, or to the injury of those who were directly or indirectly its customers.

The plaintiff was a chain-store retailer whose business was so large that defendant allowed it to buy in carload quantities and at the carload price, and therefore it could, with a profit, sell at a lower price than could the regular retailer who bought only in smaller quantities and, therefore, at a higher cost. After a time, the plaintiff began to use this advantage, not for its own profit, but to establish a cut-price competition, to the injury of the defendant's business and of that of the regular retailers upon whose success depended that of defendant. Whereupon the defendant refused to sell to plaintiff at any price; and the latter brought suit for an injunction to compel defendant to sell plaintiff, and at the prices formerly maintained between the two. The application was based upon the claim that the Anti-trust Acts, and particularly the Sherman Act and the Clayton Act, made the refusal of defendant to sell plaintiff an attempt to restrain competition by means of an indirect maintenance of prices and in promotion of a monopoly in the branded goods in question.

The denial of the application for injunction by the District Court and its affirmance by the Appellate court were based on the contention of the defendant, upon which it rested its defence, that it was only exercising its constitutional right to refuse to sell, and that under all the circumstances, and particularly in view of the fact that its only monopoly was of its brand and not of its merchandise, it could not be deprived of that right, even though the Congress should attempt to do so.

## A FUNDAMENTAL RIGHT

Much misapprehension has been current as to the force and effect of this decision, as well as to its consistency with other federal decisions involving questions of price-maintenance. This decision was the first under the so-called "Clayton Act", whereby the provisions of the former Anti-trust Acts were amended and extended. The tendency toward governmental interference in matters of private contract and of interstate trade relations had been extending until the theory of federal legislation had emerged, that, under the guise of regulating commerce between the states, the Congress could lay its hand upon every private transaction between individuals of different states. Just how far it was intended to extend this theory by the Clayton Act, it is difficult to determine from the confusion and manifest conflict of many of its terms, and particularly those of Section 2 in which discrimination as to prices and as to the selection of customers is treated.<sup>3</sup> So far, however, as concerns the right of a private trader to refuse to sell, the rule is established by this case that, if Doe refuses to bargain with Roe "for any reason or no reason," such conduct does not give Roe a cause of action; and that "if the Congress has sought to give one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property."<sup>4</sup> Or, as stated by Judge Lacombe in that part of his decision which precedes the part first above quoted:

"We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased and that his selection of seller and buyer was wholly his own concern. \* \* \* Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him;—it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court

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<sup>3</sup>Clayton Act of October 15, 1914.

<sup>4</sup>*The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. Rep. 566.



construing the same, nor the Clayton Act has changed the law in this particular.”<sup>5</sup>

The “elementary law” referred to by Judge Lacombe is clearly established by the decisions wherein has been involved the question of the right of a private trader to accept or to refuse a customer. The U. S. Circuit Court of Appeals, Second Circuit, had held that, whatever might be the rights of a complainant to an injunction against those conspiring to injure its business, an injunction would not lie to compel a defendant against its will to sell goods to the complainant.<sup>6</sup> The U. S. Supreme Court had held that “freedom to contract and abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law.”<sup>7</sup> The federal court had also said:

“All of the rights of contract which are necessary for the carrying on of ordinary business affairs are protected by the constitution, and are not capable of being restrained by legislative action. Among these rights is that of forming business relations between man and man. A man may form business relations with whom he pleases, and in the conduct of such business they may fix and limit the character and amount of their business, the price they will charge for the produce which they offer to the public, or about which they contract. \* \* \* A man has a constitutional right to buy anything \* \* \* or to refuse to sell it at all.”<sup>8</sup>

The U. S. Circuit Court of Appeals, Second Circuit, decision by Judge Lacombe, had also held:

“An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with

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<sup>5</sup>*The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, opinion by Judge Lacombe of U. S. C. C. of A., Second Circuit, filed Nov. 10, 1915, 227 Fed. Rep. 46.

<sup>6</sup>*Greater New York Film Rental Co. v. Biograph Co.*, 203 Fed. Rep. 39.

<sup>7</sup>*Standard Oil Co. v. U. S.*, 221 U. S. 1, 56; and *Adair v. U. S.*, 208 U. S. 161, 172.

<sup>8</sup>*In re Grice*, 79 Fed. 627.

which governmental paternalism has not as yet sought to interfere.”<sup>9</sup>

The same court, Eighth Circuit, decision by Judge Sanborn, where a refusal to sell was complained of, held:

“There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any of these common rights of owners and vendors of merchandise, and, if it did not combine with some other person or persons so to do, its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it, was not the violation of the Sherman Anti-Trust Act charged in the indictment.”<sup>10</sup>

#### PRICE-MAINTENANCE NOT UNLAWFUL PER SE

The fallacy of those who deny the right to refuse to sell, or who confine the exercise of such right within limits which do not involve either a direct or indirect maintenance of resale prices, arises from a misapprehension of the established fundamental rule that a private person must be protected in his right to alienate his private property. It is said that the property in a thing having once passed from A to B, then B's right of alienation should remain unrestricted, and that any attempt, by conditions subsequent, either as to prices or otherwise, to restrain or restrict such right of alienation, or in any wise to retain control of the vendor of the thing sold, is a restraint of trade repugnant to the common law as well as to statutory law.

It is further claimed that an attitude of mind on the part of the vendor which is marked by his determination not to

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<sup>9</sup>*Dueber Watch Case Co. v. Howard Watch Co.*, 66 Fed. 637, 645.

<sup>10</sup>*Union Pacific Coal Co. v. U. S.*, 173 Fed. Rep. 737.

make further sales, in case goods already sold are not handled by the vendee according to request, constitute such unlawful restriction upon alienation. But such reasoning fails to recognize the very right of alienation against which it is sought to avoid restriction. The right to alienate cannot exist except that there goes with it at the same time the right to refuse to alienate. Freedom of alienation, which is the fundamental right, includes the right of refusal to alienate just as much as it does the right to alienate. Moreover, neither of these rights is dependent upon the motive or the reasons which move the trader in his action with respect to them. A private trader may sell to one man because he is red headed, and may refuse to sell another man because he is not red headed. The point is, that the reasons are immaterial. Consequently, the right to refuse to alienate is not diminished by the fact that it happens in any particular case that the real reason for the refusal is the conduct of the proposed vendee with respect to past transactions; and this is just as true whether the conduct complained of is a failure to maintain resale prices as any other action or failure of action.

There is a distinction between the legal exercise of the right of price-maintenance and the unlawful exercise of such right. There is a vast difference, both in reason and in law, between an attitude of mind on the part of the trader toward his customers in respect of potential sales, and an attempt on the part of the same trader to control by contract the resale prices of goods already sold and to enforce such resale contracts by suits for injunction or for damages. The fact is too much overlooked, that the cases, in which resale prices have been attempted to be maintained by a vendor and in which such attempts have been held illegal and unenforcible, have been cases where the vendor has attempted to enforce contracts, express or implied, between himself and his vendee for the maintenance of such resale price. Moreover, in such cases the particular merchandise in question was of the kind which was not only susceptible of monopoly, but was of a kind in which the vendor had an exclusive monopoly. Such, for instance, was the so-called "Peruna" case;<sup>11</sup> the patent medicine

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<sup>11</sup>*Park & Sons v. Hartman*, 153 Fed. 24.

case;<sup>12</sup> the copyrighted book cases;<sup>13</sup> and the so-called "Sanatogen" case.<sup>14</sup>

All these cases involved a monopolized kind of merchandise and the attempt on the part of the vendor to enforce a contract as to resale prices. In none of them is involved the question of the right to refuse to sell. Neither is the so-called "Toasted Corn Flakes" case an authority for the restriction of the right to refuse to sell, for that case involved a merchandise which was confessedly prepared and cooked by a secret process and thereby became a separate commodity actually monopolized by the vendor; and by the decision in that case, the general right to refuse to sell, applicable to unmonopolized articles, was expressly recognized, for the court said:

"Nor do the facts present a case for the application of the rule, that defendants are not required to sell anyone they do not wish."<sup>15</sup>

It is also a mistake to view the consent decree entered in the Kellogg case as an adjudication against the right to refuse to sell even as to the kind of merchandise there involved; for, by the terms of the consent upon which such final decree was entered, the right to refuse to sell was expressly reserved.

The statement, therefore, by Judge Lacombe, that, as applied to branded goods as to which the monopoly consisted of the control of the brand rather than of the goods themselves, it was "elementary law that a trader could sell to whom he pleased and that his selection of seller and buyer was wholly his own concern," is fully supported by all the precedents.

Indeed, further support of the right to refuse to sell in such cases is shown by certain state decisions which, with their reasoning, are approved and followed by the federal courts in the decisions of Judges Hough and Lacombe, here discussed. In California, a marketer of a branded selection of olive oil was held to have the right to make enforceable contracts

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<sup>12</sup>*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373.

<sup>13</sup>*Bobbs-Merrill v. Strauss*, 210 U. S. 339; *Strauss v. American Publishers Assn.*, 231 U. S. 222, 236.

<sup>14</sup>*Bauer v. O'Donnell*, 229 U. S. 1.

<sup>15</sup>*U. S. v. Kellogg Toasted Corn Flakes Co.*, 222 Fed. 725-729.

for resale prices,<sup>16</sup> as was also the marketer of a selection of chocolate which he sold under his special brand and name.<sup>17</sup> In both those cases the right was sustained, even as to the making of contracts for resale prices, because the contract did not involve the whole of any commodity, but only a selection therefrom, and because the monopoly in question was only in the brand and name and not in the commodity. The federal cases decided under the Anti-trust Acts, already referred to, were clearly distinguished by the California court. These cases and the decisions therein made were afterwards followed by the Washington court in a case where a manufacturer of a particular brand of flour was held to have a monopoly, not of flour, but of his brand, and, there being no monopoly of the commodity itself, therefore a contract for a resale price was not unenforcible as being repugnant to the prohibitions against restraint of trade, either under the common law or under the statutes of the state or of the nation.<sup>18</sup>

#### PRICE-MAINTENANCE FOR BRANDED UNMONOPOLIZED GOODS

From the foregoing it is manifest that it has been too much assumed by the proposers of certain federal legislation in amendment of the present Anti-trust Acts, that the federal decisions against price-maintenance prevent the marketer of a branded selection out of an unmonopolized commodity, whose monopoly consists alone of his trade-marked brand and name, from making enforcible contracts as to resale prices which are reasonably necessary to protect him in the business and good will built up upon the strength of his own brand and name. It is now clearly decided that, with respect to such selections of merchandise, there is nothing in existing laws which prevents the trader from refusing to sell; and, further, that any attempt to restrict such right of refusal to sell, especially as applied to such merchandise, would be invalid.

These decisions should be an authority and recommendation to the Congress to pass the so-called "Stevens Bill", expressly

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<sup>16</sup>*Grogan v. Chaffee*, 156 Cal. 611.

<sup>17</sup>*Ghirardelli v. Hunsicker*, 164 Cal. 355.

<sup>18</sup>*Fisher Flour Mills Co. v. Swanson*, 76 Wash. 649.

authorizing the maintenance by contract of resale prices, of goods sold under trade-mark or special brand, provided the contracting vendor has not a monopoly in the general class of merchandise to which such goods belong and is not a party to a combination with competitors to maintain such prices.

Whether the right of such price-maintenance shall depend upon elementary principles of law, as held in these recent decisions, or shall depend upon legislation, so far as such legislation shall be necessary, the establishment of such right is absolutely essential to the proper protection of the brand and name belonging to any trader under the trade-mark laws. The establishment of the right to refuse to sell, now clearly adjudicated to be beyond the power of legislative interference, is a long step toward the necessary protection of the owner of a trade-marked brand. Without further legislation, such as is proposed by the "Stevens Bill", the indulgence in unfair methods of competition through price-cutting will result in the destruction of the good will and business of the owners of brands and will injure public interests by the stifling of competition.

#### THE STRANGLING OF COMPETITORS BY PRICE-CUTTING IS NOT "COMPETITION"

A price cutter is usually a financially strong trader, who makes up his losses of profits on cut-price goods either by the number of his sales or by extra profits on other articles sold to the consumer under the decoy of the cut-price upon one or a few articles. The regular retailer cannot meet such competition and is driven out of business. That which is, properly speaking, "competition" in trade, is thereby strangled and the only competition which is promoted is that of the particular branded article against itself. As stated by Judge Hough in the decision above cited:

"the only trade restrained" [by price-maintenance of branded selections of unmonopolized goods] "is the commercial warfare of a large buyer against small ones, or that of a merchant who for advertising purposes may sell an article at a loss, in order to get customers at his shop, and then persuade them to buy other things at a compensating profit \* \* Competition, as encouraged by statutes and decisions, does not include such practices."

Indeed, as stated by Judge Hough, it is precisely such cut-price methods of competition "whose hardship and injustice have often been judicially commented upon."<sup>19</sup> The Federal Supreme Court, referring to such practices, has stated:

"In business or trade combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly or unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings."<sup>20</sup>

So, the New York Court of Appeals:

"An active competition and rivalry in business is, undoubtedly, conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein and thus result in a derangement of the business, an inconvenience to the consumers, and in public harm."<sup>21</sup>

In its most recent decision under the Anti-trust Acts the Federal Supreme Court said:

"It is a mere truism to say that the fixing and maintaining by a manufacturer of a fair price above cost is not only a right but a commercial necessity; and any other course must end in his bankruptcy. When such fair prices are departed from, and they are unreasonably raised and exacted from the purchasing public, the public is prejudiced thereby. On the other hand, when that price is so unreasonably lowered as to drive others out of the business, with a view of stifling competition, not only is that wronged competitor individually injured, but the public is prejudiced by the stifling of competition."<sup>22</sup>

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<sup>19</sup>*The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. Rep. 566.

<sup>20</sup>*U. S. v. Freight Assn.*, 166 U. S. 321, 322-324.

<sup>21</sup>*Park v. Nat'l Wholesale Druggists Assn.*, 175 N. Y. 1.

<sup>22</sup>*U. S. v. U. S. Steel Corporation*, decided June 3rd, 1915, U. S. District Court of New Jersey, opinion by Buffington, Judge, page 33.



THE DENIAL OF THE RIGHT TO REFUSE TO SELL MEANS GOVERNMENTAL PRICE FIXING

The denial of the right of a trader to refuse to sell, and that independently of the reasons for his refusal, would mean a return to the obsolete and the unworkable system of governmental price fixing. To enjoin a trader from refusing to sell,—that is, to impose by statute or by injunction a compulsion to sell,—necessarily involves the fixing of the price at which he shall sell. In the case before Judge Hough it was argued that, because defendant could not enforce a price-fixing agreement, it could not accomplish by any method, even indirectly or partially, any fixing of prices. But this argument is answered by Judge Hough by his statement that: "It is an amusing commentary on this doctrine that the main object of this suit is to have this Court *compel* delivery at \$3.95 per case,—which is *pro tanto* price fixing."<sup>23</sup>

A doctrine which viewed mere abstention from dealing as *per se* price-fixing, and, therefore, as an abstention which gives the right of injunction, would lead to a return to the meddling paternalism of those ancient statutes which utterly disregarded the fundamental right of liberty of contract and of property,—statutes which were repugnant to the elementary private right of alienation. Until comparatively recent times there have remained upon the statute books of England certain ancient statutes which have become obsolete, but which are the remnants of the once interfering hand of the legislature in respect of private contracts of sale. One of these is the statute fixing the maximum price of labor and imposing upon all the legal obligation to work for anyone who demanded service.<sup>24</sup> An English act of 1350 compelled laborers to stand for hire in open market and to serve at not less than maximum prices, and also prohibited departure from the country. In 1562 another statute required all able-bodied persons between certain ages to work for anyone demanding their services, and empowered justices-of-the-peace and sheriffs in each county to fix and limit

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<sup>23</sup>*The Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. Rep. 566.

<sup>24</sup>The English Statute of Labours, of 1349.

the wages to be paid; and the same statute also fixed the minimum hours for labor.

In America the Continental Congress, on November 22, 1777, in order to remedy the disadvantages of the depreciated currency, passed a resolution providing for the appointment of commissioners from the different states to regulate the price of labor, manufactures and produce; and in 1778, the New York legislature passed an act fixing the wages of labor and the prices of many articles of merchandise and even the profits of traders and vendors. In 1776-7, on the recommendation of a committee representing the New England states, many of those states adopted statutes fixing the maximum prices of labor and of wheat, salt, sugar, molasses, shoes and of many other articles of merchandise. All such statutes were found unenforceable as a practical matter, although constitutional protection of the liberty of contract and of the right of alienation of private property was not then alone sufficiently preventive of the enforcement of such legislation.

The assertion today of the right of governmental prohibition, whether through the courts or through the legislature, of the right of a private trader to refuse to sell his private property, would be a return to the obsolete doctrines of those ancient statutes, which are so contrary to the theory of our present constitutional government that they are now cited only as impossible absurdities. They constitute instances, in the words of Judge Lacombe, "where the selection of a trader's customers is made for him by the government." They denote a policy of governmental meddling with private business transactions which has been altogether too closely approached, but as yet not reached, in modern American jurisprudence.

ROME G. BROWN.

MINNEAPOLIS, MINN.

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**UNIFORM STATE LAWS**  
**(Pamphlets 41 to 43).**



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**First Biennial Report**

**OF THE**

**Minnesota Board of  
Commissioners**

**ON**

**Uniformity of Legislation**

**MADE TO THE**

**State Legislature**

**AT ITS**

**1913 Session**

1912.  
**SYNDICATE PRINTING CO.,**  
**Minneapolis, Minn.**









**Third Biennial Report**

**OF THE**

**Minnesota Board of  
Commissioners**

**ON**

**Uniform State Laws**

**MADE TO THE**

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OF THE  
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ON  
**Uniform State Laws**  
MADE TO THE  
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AT ITS  
**1917 Session**

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*To the Honorable the Legislature of the State of Minnesota:*

The undersigned, the Minnesota "Board of Commissioners for the Promotion of Uniformity of Legislation in the United States," pursuant to Sections 50 to 53, General Statutes 1913 (Chapter 68, Laws 1911), have the honor to submit this, their third biennial report.

By this act the duties of this Board are prescribed as follows: "It shall be the duty of said board to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates, the descent and distribution of property, the acknowledgment of deeds, the execution and probate of wills, and other subjects upon which uniformity is desirable; to confer with the commissioners appointed for the same purpose by other states in drafting uniform laws to be submitted for approval and adoption by the several states; and said board of commissioners shall meet annually with the conference of commissioners on uniform state laws for the promotion of uniformity of legislation in the United States, and join with it in such measures as may be deemed by the said board most expedient to advance the objects of said conference.

"Said board of commissioners shall keep a record of all its transactions and shall, at the beginning of each biennial session of the legislature of this state, and may, at any other time, make a report of its doings, and of its recommendations, to said legislature."

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS.

The Conference of Commissioners on Uniform State Laws referred to in the above statute is now known as the "National Conference of

Commissioners on Uniform State Law." It is an organization effected by commissioners appointed by the various states for the promotion of uniformity of legislation in the different states on all subjects where uniformity is deemed desirable and practicable. Its conferences are held annually in the place of meeting of the American Bar Association and immediately preceding, and its proceedings are briefly reported in the American Bar Association Report, and they are more fully reported in the annual volume of its own proceedings.

The organization drafts bills to make uniform the laws of the different states on various subjects on which uniformity seems practicable and desirable, and recommends them for adoption by the various legislatures.

It is, in effect, another Federal Congress in which each of the forty-eight states and five territories is represented by three or more legislative members. The work of the national conference differs from that of Congress, however, in that its work is confined to the drafting of model uniform acts for submission to the respective state legislatures. Its 160 or more delegates are appointed on standing and special committees for investigation and report to the general conference; and when the recommendation of a committee is adopted favoring the drafting of a uniform act upon a given subject the best special talent in the country is enlisted to draft a tentative model act. The tentative act is then submitted to the members and to the country at large for criticism and amendment; and, if it does not meet with general satisfaction, is redrafted and resubmitted, until a final draft is at length produced that meets the general requirements of a model uniform act. These uniform acts are also approved by the American Bar Association.

Twenty-six conferences have thus far been held, the last one in Chicago, August 23d to 29th, inclusive.

The uniform acts already recommended, the year when adopted by the conference, the number of states that have adopted the same and the section of Minnesota General Statutes 1913 relating to the same, follow.

# UNIFORM STATE LAWS ALREADY FRAMED AND ADOPTED BY THE NATIONAL CONFERENCE OF COMMISSION- ERS ON UNIFORM STATE LAWS

(Approved also by American Bar Association)

<b>THE UNIFORM COMMERCIAL ACTS (1)</b>	Year Ap- proved	No. States Adopt- ing	Sections of Minn. G. S. 1913
Negotiable Instruments Act..	1896	44	Adopted 5813 to 6009
Warehouse Receipts Act.....	1906	31	Adopted 4514 to 4575
Sales of Goods Act.....	1906	13	
Bills of Lading Act .....	1909	11	
Stock Transfer Act .....	1909	10	
Partnership Act.....	1914	3	
Limited Partnership Act.....	1916	.....	
<b>THE UNIFORM SOCIAL ACTS—</b>			
Marriage and Marriage License	1911	3	
Return of Marriage Statistics	1907	.....	
Divorce Act.....	1907	3	
Return of Divorce Statistics ..	1907	.....	
Marriage Evasion Act.....	1912	4	
Family Desertion Act.....	1910	9	Covered by 8666 & 7
Child Labor Act.....	1911	.....	Covered by 3839 to 3850
Workmen's Compensation....	1914	33*	Covered by 8195 to 8230
Act for Extradition of Persons of Unsound Mind.....	1916	.....	

## OTHER UNIFORM ACTS—

Pure Food and Drug Act.....	1915	2	
Probate of Probated Foreign Wills.....	1915	.....	Covered by 7274
Wills Executed out of State....	1910	10	Covered by 7253
Acknowledgments Act.....	1892	6	Adopted 5744
Foreign Acknowledgments Act.	1914	2	Covered 5746, 7 & 8
To Regulate Cold Storage of Certain Articles of Food .	1914	2	
Land Registration Act (Tor- rens).....	1915	14*	Covered by 6868 to 6951
Uniform Flag Act.....	1915	34*	Partially covered by 9012

(1) The Commercial Acts are practically codifications of the subjects treated, and are designed for adoption without substantial change.

(2) The Marriage, Divorce and Marriage Evasion Acts being designed to bring about uniformity in marriage and divorce laws throughout the nation, are designed to be adopted without substantial change.

(3) Family Desertion, Child Labor, Cold Storage, Pure Food and Workmen's Compensation are designed for model laws and to be changed to meet state conditions.

\*Numbers marked with a star indicate that the adopted acts are not uniform. Virginia Torrens Act is the Uniform Act.

Official copies of the foregoing acts may be found in the Proceedings of the Association for the year the act was approved by the Conference and in the American Bar Association report of the following year.

The work of the Commissioners on Uniform State Laws, we believe, merit the special attention of all publicists as well as of the state legislatures. They are pointing out in a marked degree how legal as well as judicial unity may come out of the babel of laws from forty-eight sovereign states. The objection that all states cannot be induced to agree upon and pass the same act, has been discredited, as the Uniform Negotiable Instruments Act has already been passed in all states except Maine, Mississippi, Texas and California, and it will probably be adopted in at least two of those states at the coming sessions of the legislature.

Another objection to the accomplishment of the purpose of procuring and maintaining uniform state laws throughout the nation was, that the object, even if legislatively accomplished, would be defeated by conflicting judicial construction of the uniform acts after adopted by the states. But this objection has already been cared for. To obviate this legal sin, there was organized in 1913, a judicial section of the American Bar Association, consisting of all federal and state judges of courts of final appeal in the United States, who are members of the American Bar Association, and the object being to promote uniformity in judicial construction of the same statutes adopted in different states. This movement has been wholly successful, the judicial section having held three meetings in connection with the American Bar Association, the last one at Chicago in September, 1916. The American Bar Association has also a Committee on Uniform Judicial Procedure which has accomplished much along that line, notably in connection with the federal judicial procedure, which it is hoped will form a model for state procedure.

So we now have for the promotion of uniformity of laws among the states: for uniformity of statutes, the Commissioners on Uniform State Laws; for uniformity of decisions, the Judicial Section of the American Bar Association; and for uniformity in judicial procedure, the Committee on Uniform Judicial Procedure.

A notable work done by the conference is the Bureau of Uniform Judicial Decisions, maintained by its Committee on Uniformity of Judicial Decisions. This committee collects every decision in the country upon each section of every uniform act from the time of its enactment, for the benefit of any judge of a court of last resort applying for the same. We were informed at the conference by Judge Stockbridge of Baltimore, the chairman of that committee, himself a judge of the



Court of Appeals of Maryland, that the committee was called upon numerous times during the last year for citations upon those sections, and that he frequently received from the judges to whom the citations were furnished an expression of hearty appreciation for the same.

The cause of uniform state laws has small appeal to any special monied interest, but it should have a strong appeal to the people at large.

The weakness of our cause in not appealing to any special interest, should be its strength in the legislature, and by recognizing the immense importance of the cause of uniform state laws, it can render the state a great service.

Mr. Edward Lees, who had been an active member of this commission from its organization, refused reappointment in 1915, and S. R. Child was appointed in his stead.

Commissioner Rome G. Brown and C. A. Severance attended the Salt Lake City Conference in 1915. At this conference the Uniform Land Registration Act (Torrens Act) and the Uniform Flag Act were adopted.

The last conference was held at Chicago, August 23d to 29th, inclusive, and your commissioners, Rome G. Brown, C. A. Severance and S. R. Child, attended throughout the conference. The Uniform Limited Partnership Act and the Uniform Act for the Extradition of Persons of Unsound Mind were adopted at the conference. Commissioner Severance is at present vice-president of the national organization. Commissioner Child was appointed chairman of the new Legislative Committee created in 1915 and was reappointed for the present year. Commissioner Brown is chairman of the important committee of the conference to co-operate with the American Judicature Society.

The Minnesota State Bar Association has loyally supported the work of this commission and the cause of uniform state laws. It now has, and since the organization of this commission has had, a standing committee on Uniform State Laws. This committee has made written reports to the annual meetings, which may be found in the Reports of the Association. The present committee of the Association upon Uniform State Laws is, S. R. Child, Donald E. Bridgman and C. R. Magney.

We have not found in the past session of the legislature any opposition to the Uniform Commercial Acts. There is no reason why Minnesota should not be enjoying the benefits of all the commercial laws, sales of goods, bills of lading, stock transfer, partnerships and limited partnerships. These acts are all codifications of the subject

framed by the best talent in the country, and are so framed at great expense and with the co-operation of the experts from nearly every state in the Union.

#### APPROPRIATION.

The national organization is supported solely by voluntary contributions from the states. Its expenses for printing, expert draftsmen and the maintenance for carrying on a national organization is considerable. Its funds cannot be raised from business or other private interests because of apparent objections.

The act establishing the commission provided a standing appropriation of \$1,000 for the expenses of the Minnesota commissioners and the support of the national conference. The 1913 legislature repealed all standing appropriations, but made appropriations for the two ensuing years. The 1915 session through oversight failed to make any appropriation.

We earnestly urge the legislature to renew the appropriation of \$1,000 in accordance with the terms of the act establishing the commission, and the State Bar Association made the same request by resolutions in 1915 and in 1916.

#### THE PRINCIPLE OF UNIFORMITY JUDICIALLY RECOGNIZED

Each Uniform State Act contains this provision: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." It has been claimed that this clause would have no effect in judicial construction, but the Supreme Court of the United States has in the present year settled that contention against the claim.

In a notable decision and a land mark in uniform state laws, in the case of Commercial National Bank vs. Canal-Louisiana Bank and Trust Co., decided in January, 1916, the Court determined that the uniform acts of any state could be relied upon in any part of the nation. In that case the lower court had refused to allow the validity of the warehouse receipts in the hands of the holder, contrary to the express term of the act, but the Supreme Court reversed the lower court, turning the goods over to the holder of the warehouse receipt.

The Court speaking through Justice Hughes says: "It is said that under the law of Louisiana, as it stood prior to the enactment of the Uniform Warehouse Receipts Act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank \* \* \* and it is urged that the new statute is but a step in the development of the law and that decisions under the former state statutes are safe guides to its construction. We do not find it necessary to review these decisions. It is apparent that if these uniform acts are construed in

the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (sec. 57): 'This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.' This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the states dealing with such documents, but there still remained diversity of legal rights under similar commercial transactions. We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it; and, in this view, we deem it to be clear that in the circumstances disclosed the Commercial Bank took title to the warehouse receipts and to the cotton in question."

The Court in the decision also cites the Commissioners on Uniform State Laws as authority for certain principles determined in the decision. Since the decision of Justice Hughes, the Louisiana Supreme Court has followed that decision.

#### RECOMMENDATIONS

We respectfully make the following recommendations to your honorable body:

That appropriations be made for the use of and disbursement by the State Board of Commissioners for the ensuing two years as provided in the 1911 act establishing the Board.

That the following Uniform Acts be adopted by your honorable body:

The Uniform Sales of Goods Act.

The Uniform Transfer of Shares of Stock in Corporations Act.

The Uniform Bills of Lading Act.

The Uniform Marriage and Marriage License Act.

The Uniform Divorce and Annulment of Marriage Act.

The Uniform Act for the Extradition of Persons of Unsound Mind.

The Uniform Sales of Goods Act has been adopted in thirteen of the most important commercial states of the Union as follows: Con-

necticut and New Jersey in 1907; Massachusetts, Rhode Island and Ohio in 1908; Maryland in 1910; New York and Wisconsin in 1911; Michigan and Arizona in 1913, and Pennsylvania, Illinois and Nevada in 1915.

For the use of the legislature in considering the act, Mr. Donald E. Bridgman, of the Uniform State Law Committee of the State Bar Association, has thoroughly annotated the Sales Act with the statutes and decisions of the state on sales, showing the changes if any that would be made, the doubtful questions cleared up, and the bearings of the Uniform Act generally upon the law of sales of goods in this state.

The Uniform Stock Transfer Act was approved by the conference in 1909, and has been adopted in the following ten states: Massachusetts, Maryland and Louisiana in 1910; Pennsylvania and Ohio in 1911; Rhode Island in 1912; New York, Michigan and Wisconsin in 1913, and New Jersey in 1916.

The Uniform Bills of Lading Act has been passed in eleven states as follows: Massachusetts and Maryland in 1910; Connecticut, New York, Pennsylvania, Ohio, Illinois, Michigan and Iowa in 1911; Louisiana in 1912, and Vermont and Washington in 1915. The Uniform Bills of Lading Act has become a law for interstate commerce at the present session of Congress. It would seem desirable for this state to have interstate and intrastate bills of lading alike.

Also the Uniform Marriage and Marriage License Act has been adopted by Wisconsin and some other states with slight changes. This act, sponsored by Hon. Claude Southwick, passed the House in 1913, but failed to come to a vote in the Senate.

The Uniform Divorce and Annulment of Marriage Act would put our divorce laws in a much better shape than at present. It makes the grounds for divorce two years desertion instead of one, and two years of habitual drunkenness instead of one as at present, but the time can be changed without affecting the main advantages of the bill.

The Uniform Marriage Evasion Act is naturally a companion bill of the Uniform Marriage and the Uniform Divorce Acts. The act is designed to prevent the laws of our state from being used by a citizen of another state to evade the marriage laws of his own state, and when adopted in other states will prevent that state being used to evade the marriage laws of our state.

The Uniform Act for the Extradition of Persons of Unsound Mind provides for a means of returning a person of that class escaping into another state.

At present the only state statute upon the subject is in Massachusetts, put into the codification of the laws of the state relating to

he insane in 1909 by Dr. Henry R. Stedman of Boston, Mass., a member of the Codification Commission.

We desire to call the special attention of each member of the legislature to each of the Uniform Acts on a preceding page, not already adopted in this state. We would be glad to have volunteers to introduce the Uniform Acts recommended. But members may be interested in other acts, and they are all worthy of careful consideration. There is nothing proprietary in the nature of these Uniform Acts. They all belong to anyone who would sponsor them.

Should you wish to introduce one or more of these acts as drawn, they are in print and can be introduced without being rewritten, a distinct gain in many ways. Should you wish to introduce a bill touching a subject embraced within these laws, although not the Uniform Act itself, you will find nowhere else so complete and reliable suggestions and information as in these Uniform Acts, and in the information and briefs collected and in print, relating to the same, either in the American Bar Association Reports or the Report of the Proceedings of this Association, both of which may be found in the law library, or as notes in connection with the printed act.

We shall be glad to furnish some, or all, of these acts to anyone interested in them, and also any information in relation thereto that you may desire.

Respectfully submitted,

ROME G. BROWN, Minneapolis, Minn.,

CORDENIO A. SEVERANCE, St. Paul, Minn.,

S. R. CHILD, Minneapolis, Minn.,

State Board of Commissioners  
on Uniform State Laws.

Both biennial (bi) and annual (an) legislative sessions covered in January except as shown		Commissioners appointed by Legislative Authority	Limit of Sessions (No. of days)		Negotiable Instruments, 1896	Warehouse Receipts, 1906	Sales, 1906	Stock Transfer, 1909	Bills of Lading, 1906	Partnership, 1914	Torrens Land Registration Act (not uniform)	Workmen's compensation (not uniform)
Bi	'17	x	none	Maine.....								'15
Bi	'17	x	none	New Hampshire.....	'09							'11
Bi	'17	x	none	Vermont.....	'12	'12			'15			'15
An	'17	x	none	Massachusetts.....	'98	'07	'08	'10	'10		'98	'11
An	'17	x	60	Rhode Island.....	'99	'08	'08	'12				'12
Bi	'17	x	5 mo	Connecticut.....	'97	'07	'07		'11			'13
An		x	none	New York.....	'97	'07	'11	'13	'11		'08	'14
An		x	none	New Jersey.....	'02	'07	'07	'16				'11
Bi	'17	x	none	Pennsylvania.....	'01	'09	'15	'11	'11	'15		'15
Bi	'17		60	Delaware.....	'11							
Bi	'16	x	90	Maryland.....	'98	'10	'10	'10	'10	'16		'14
Bi	'16	x	60	Virginia.....	'98	'08					'16	
Bi	'17		45	West Virginia.....	'07							'13
Bi	'17		60	North Carolina.....	'99						'13	
An		x	none	South Carolina.....	'14						'16	
An	June	x	50	Georgia.....								
Bi	'17	x	60	Florida.....	'97							
Bi	'16		60	Kentucky.....	'04							
Bi	'17	x	none	Tennessee.....	'99	'09						
Quad	'19		50	Alabama.....	'07	'15					'14	
Bi	'16	x	45	Mississippi.....	'16							
Bi	'17		90	Arkansas.....	'13	'15						
Bi	May 16	x	60	Louisiana.....	'04	'08		'10	'12			'14
Bi	'17		60	Texas.....								'13
Bi	'17	x	60	Oklahoma.....	'09	'15						'15
Bi	'17	x	none	Ohio.....	'02	'08	'08	'11	'11		'13	'11
Bi	'17		60	Indiana.....	'13							'15
Bi	'17	x	none	Illinois.....	'07	'07	'15		'11		'97	'13
Bi	'17	x	none	Michigan.....	'05	'09	'13	'13	'11			'12
Bi	'17	x	none	Wisconsin.....	'99	'09	'11	'13		'15		'11
Bi	'17	x	90	Minnesota.....	'13	'13					'01	'13
Bi	'17		90	Iowa.....	'02	'07			'11			'13
Bi	'17		70	Missouri.....	'05	'11						
Bi	'17		none	Kansas.....	'05	'09						'11
Bi	'17		none	Nebraska.....	'05	'09					'15	'13
Bi	'17		60	South Dakota.....	'13	'13						
Bi	'17		60	North Dakota.....	'99							
Bi	'17		60	Montana.....	'03							'15
Bi	'17		60	Idaho.....	'03	'15						
Bi	'17	x	40	Wyoming.....	'05							'15
Bi	'17	x	none	Colorado.....	'97	'11					'03	'15
Bi	'17		60	New Mexico.....	'07	'09						'12
Bi	'17	x	60	Arizona.....	'13		'13					
Bi	'17	x	60	Utah.....	'99	'07						
Bi	'17		60	Nevada.....	'07	'13	'15					'11
Bi	'17		none	California.....		'09					'97	'11
Bi	'17		40	Oregon.....	'99	'13					'01	'13
Bi	'17	x	60	Washington.....	'99	'13			'15		'07	'11

"x"— Indicates that the caption applies to the state opposite. '09, etc.,—Indicates the year the Act in the caption was adopted by the state opposite.

1896, etc., in the caption indicates the year the act was approved by the Conference.

The states are grouped to enable comparison of the progress of legislative action upon new economic thought.

Six states hold annual, one quadrennial, and forty-one biennial sessions. All regular sessions begin in January, except Georgia (June), Florida (April) and Louisiana (May).











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**PRESIDENTIAL CAMPAIGN IN 1912:**

**MENACE OF ROOSEVELT.**

**(Pamphlet 46).**



# Appeal for Wilson Brings Reply for Taft

## College Men's League Gets Answer It May Not Relish.

## Rome G. Brown Believes Harvard Men Should Unite on Taft.

## Calls Roosevelt Apostate to Teachings of His Old School.

The efforts of the "Woodrow Wilson College Men's League" to line up the college men of the country for their candidate have met with at least one surprise. The league has sent out widely a request for contributions from college men, or for "suggestions."

One such letter, sent through the 'Harvard department' was delivered to Rome G. Brown of Minneapolis. Mr. Brown has replied. His answer has special interest because of the writer's extended Harvard record:

A graduate in the class of 1884, with the degree of A. B. magna cum laude; a member of the Harvard Phi Beta Kappa, member of the council of the Harvard Graduates' Magazine 1905-1, president of the Minnesota Harvard clubs 1905-7, president of the Associated Harvard clubs 1906-7.

The letter devotes particular attention to Theodore Roosevelt as a Harvard graduate, and is as follows:

Minneapolis, Minn., Sept. 20, 1912.  
"Mr. John L. deMaulles, Treasurer  
Woodrow Wilson College Men's  
League.

"Dear Sir—The communication from your 'Harvard department' asking for contribution to the Woodrow Wilson campaign fund or, in lieu thereof, suggestions, is received.

"My failure to contribute is not at all from any lack of esteem for Governor Wilson. He is an eminent representative of the scholar in politics, of whom Princeton men are justly proud.

"But, as a Harvard man, I feel constrained to give all the support within my power to that son of Yale, whose sturdy, judicial and statesmanlike qualities, as demonstrated by his record in public office, have made him, beyond all other presidential candidates, the exponent of that spirit of Harvard which is signified in its motto, 'Veri-

cies of parties or persons. He has been true to his friends and true to his noble principles and high sense of duty.

"Mr. Taft has fought and is still fighting for the cause of good government, for the cause of progress and reform under our constitution. He stands today, in a greater measure than does any other living person, as the bulwark of our constitutional government against impracticable and vicious innovations, heedlessly and capriciously advocated by those who blindly plunge down the path leading inevitably to tyranny, either of monarchy or of democracy for this nation.

**Calls Roosevelt "Apostate."**

"In the existing political turmoil there has emerged from the ranks of Harvard graduates, an apostate, one who is a pervert from his own sanity of tenet and of conduct, one who is recalcitrant to the spirit and teachings of his alma mater, a betrayer of his former friends and supporter and a traitor to his country. Spurning all safeguards, written and unwritten, established and confirmed for the success and stability of our constitutional government, he has projected himself into the present campaign as a presidential candidate.

"His unrestrained egotism and his unlimited ambition for self have blinded him to the pretension that, as president, he, and he alone, can dissipate all social, economic and industrial evils and that, therefore, the one great end to which all people should now first strive is to place him at the head of our government.

"This single end he presumptuously assumes to be of such paramount importance that all other considerations should, if necessary, be sacrificed to bring it about. Once the greatest exponent of the established rule against the third term he afterwards smashed a vitally safeguarding precedent by announcing his own third term candidacy with his frivolous cup-of-coffee jest.

"For that effrontery alone he deserves to be condemned. And, if that were not sufficient, then his demagogic platform of being for whatever any portion of the people want, regardless and in defiance of constitutional considerations, is enough to fill intelligent voters with distrust and fear. Then, again, his high handed, deliberate attempt by trickery to steal a nomination, and, when failing in that, his charge of theft against his intended victims themselves, are characteristic examples of his apostasy from truth.

**"Greatest Menace" In Our History**

"The Roosevelt of today is the greatest menace to good government and to the welfare of this nation has ever, in the history of this









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ROME G. BROWN

**ROME G. BROWN,**

Of Brown & Guesmer, Lawyers, 1000-12 Metropolitan Life Building,  
Minneapolis, Minn.

Born: Montpelier, Vt., June 15, 1862; son of Andrew Chandler and Lucia A. (Green) Brown; direct descendants of early immigrants of Pilgrim days from England to the New England Colonies.

Educated: Public schools of Montpelier, Vt.; Harvard University (A. B.), 1884. Studied law in Vermont in the office of Hon. B. F. Fiefield, Montpelier. Admitted to the Bar November, 1887, and the following month came to Minneapolis, and engaged in the practice of law; admitted to practice in the United States Supreme Court, May, 1895. Active in connection with the Minnesota State Bar Association and the American Bar Association; was president of the former, 1906-1907; member of the Executive Committee of the American Bar Association, 1906-1909; chairman of Minnesota State Board of Commissioners on Uniform Laws since 1911; vice-president of National Conference of Commissioners on Uniform State Laws, 1913-1914; has been chairman of American Bar Association Committee to Oppose Judicial Recall since 1912.

Has made a special study and practice of the law of water rights and water powers, and has been engaged in important cases on water power in State, Federal and United States Supreme Courts. During the past six years has made a special study of state and federal legislation with regard to water powers in the United States, for the purpose of remedying defects in state and federal legislation, which has restricted water power development in this country.

November, 1911, presented before the National Waterways Commission a comprehensive discussion on the subject, "Limitations of Federal Control of Water Powers," which has been widely used for reference, both inside and out of Congress, and which on motion of Senator Root, was printed as United States Senate Document No. 721, 62nd Congress, second session; also is author of other published discussions of the Water Power question, including the following: article in the Harvard Law Review of May, 1913, on "The Conservation of Water Powers" (printed as U. S. Senate Document No. 14, 63rd Congress, First Session); also an argument before the United States House Committee of Foreign Affairs, upon the Federal Control of Water Power, at Niagara Falls. At the Tenth Annual Convention of the National Rivers and Harbors Congress, held at Washington, D. C., December 3-5, 1913, he delivered address on "Legislative Obstacles to the Improvement of Navigable Rivers" (printed as United States Senate Document No. 332, 63rd Congress, second session); also prepared by request an address on "The Water Power Problem in the United States" for the International Water Power Congress, to have been held at Lyon, France, September, 1914, but was prevented from convening by the war; this address was published by the Yale Law Journal of November, 1914, and has been published in French by the International Congress. At the second Pan-American Scientific Congress, held in Washington, D. C.,

December 27, 1915, to January 8, 1916, he presented a paper which has since been published in both English and Spanish, on "Laws and Regulations Regarding the Use of Water in Pan-American Countries." He has also become a prominent authority on the subject of the statutory minimum wage, of which he is a pronounced opponent, both upon economic and constitutional grounds, and is counsel in the so-called "Oregon Minimum Wage Cases," now pending in the United States Supreme Court to test the constitutionality of these statutes.

He has also gained a national reputation by his work as chairman of the American Bar Association Committee to Oppose Judicial Recall, his many addresses being given and published throughout the United States.

He and his firm are in general practice, with offices at 1000-1012 Metropolitan Life Building, Minneapolis.

Married: Mary Lee Hollister, daughter of Samuel Dwight Hollister, at Marshfield, Vt., May 25, 1888; has one son, Edward Chandler Brown, and one daughter, Dorothy Hollister Brown.

Clubs: Minneapolis; Athletic; Minnikahda; Automobile; Harvard Clubs of Boston, New York and Minnesota (president of latter 1908-1910); American Universities Club, London, England; President of the Harvard Associated Clubs of the United States, 1906-1907.

Societies: Loyal Legion; Phi Beta Kappa (Harvard, 1884); also various economic, legal and research and reform associations.

Republican.

Unitarian.

Residence: 1918 Queen Ave., So., Minneapolis, Minn.















113-1000

